Supreme Court, U.S.

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GEORGE RAYMOND ANDERSON,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORP.,
DOUGLAS M. CROW,
ANTHONY E. WEYNAND,
RICHARD P. SHLAKMAN,
and DARRELL JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHERYL P. HUNTER
50 Penn Place
Suite 1300
Oklahoma City, Oklahoma 73118
(405) 848-2255

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49 pp

QUESTIONS PRESENTED

I. Whether it is error to find that a plaintiff's state law cause of action for wrongful discharge for refusing to violate certain federal and state laws including the Employee Retirement Income Security Act ("ERISA") and reporting certain violations of such laws "relates to" ERISA.

II. Whether it is error to apply the doctrine of complete preemption as relates to ERISA, instead of the well-pleaded complaint rule, regardless of whether the claims relate to ERISA, where the claims asserted in plaintiff's state law petition do not fall within the scope of ERISA's civil enforcement provision, § 502(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 11 F.3d 1311 (5th Cir. 1994) and is reprinted in the Appendix to this Petition, at A1-A12. The Memorandum Order granting the Respondent Summary Judgment and the Order denying Petitioner's Motion to Remand, issued by the United States District Court for the Northern District of Texas, Dallas Division, are also reprinted in the Appendix to this Petition at B1-B9 and C1 respectively.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A) was entered on January 24, 1994. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves various provisions of the Employee Retirement Income Security Act, 29 U.S.C.S. § 1001 *et seq.*, including the following:

29 U.S.C. § 1132(a) [ERISA § 502 (a)] provides in pertinent part:

> (a) Persons empowered to bring a civil action. A civil action may be brought –
>
> (1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).

29 U.S.C. § 1140 [ERISA § 510] provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the

> provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 U.S.C. § 1144(a) [ERISA § 514(a)] provides:

> (a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

(1) Court Proceedings and Disposition in Courts Below:

Procedurally, the instant case comes before this Court following a court of appeals' affirmance of a district court's award of summary judgment to Respondent.

The Petitioner, George Raymond Anderson, commenced this action in the District Court of Dallas County, Texas on June 26, 1991. The Petitioner named as defendants the following parties: Electronic Data Systems Corporation (hereinafter referred to as "Respondent" or "EDS"), Douglas M. Crow (hereinafter referred to as "Crow"), Anthony E. Weynand (hereinafter referred to as "Weynand"), Richard P. Shlakman (hereinafter referred to as "Shlakman"), and Darrell Johnson (hereinafter referred to as "Johnson"). Respondent, along with other defendants in this case, removed Petitioner's action to the United States District Court for the Northern District of Texas, Dallas Division (the "District Court"), on July 25, 1991. The basis for removal, as contended by Respondent, was that Petitioner had asserted, on the face of his pleading, a claim for wrongful discharge arising under the Employee Retirement Income Security Act ("ERISA"). Petitioner filed Plaintiff's First Amended Complaint in the District Court on October 21, 1991. Petitioner asserted causes of action against Respondent and the other defendants for (1) wrongful discharge pursuant to Texas state law, (2) intentional infliction of emotional harm, (3) negligent infliction of emotional harm, (4) tortious interference, and (5) breach of contract. Respondent, collectively with Weynand, Shlakman, and Johnson, filed its Answer to Plaintiff's First Amended Complaint on October 31, 1991 in the District Court. Crow filed his Answer to Plaintiff's First Amended Complaint on November 14, 1991 in the District Court.

On November 15, 1991, Crow filed a Motion for Summary Judgment against Petitioner. Petitioner filed his Response to Crow's Motion for Summary Judgment on

December 5, 1991. Petitioner also filed, on December 5, 1991, his Motion to Remand requesting that the District Court remand his action to the 191st Judicial District Court of Dallas County, Texas.

EDS, Weynand, Shlakman and Johnson responded to Petitioner's Motion to Remand on December 30, 1991. Crow joined in that Response to Petitioner's Motion to Remand on December 30, 1991. The District Court denied Petitioner's Motion to Remand on January 7, 1992.

Crow filed a Supplemental Motion for Summary Judgment on June 1, 1992. The District Court granted Crow's Motion for Summary Judgment on December 12, 1992. Petitioner filed Plaintiff's Second Amended Complaint in the District Court on April 13, 1993. On or about May 4, 1993, EDS filed in the District Court its Motion for Summary Judgment. The District Court granted Respondent's Motion for Summary Judgment on June 4, 1993. The District Court also made various other rulings during the course of proceedings in this case which affected the parties hereto and the issues involved.

Petitioner filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit on June 30, 1993. The basis of the appeal was that the District Court erred in denying Petitioner's Motion to Remand. The Fifth Circuit rendered its opinion on January 24, 1994, affirming the judgment of the District Court.

(2) Statement of Facts:

Petitioner was hired by Respondent, EDS, on October 15, 1984 whereupon Petitioner assumed a managerial

position in the Domestic Treasury Department of EDS. (Plaintiff's Response to Motion for Summary Judgment of Defendant, EDS, (hereinafter "Plaintiff's Response"), p. 3, No. 3). Petitioner's job performance was consistently judged to be adequate or superior by his supervisors and others, and he received numerous commendations on his job performance at EDS. (Plaintiff's Response, p. 5, No. 6). In October, 1985 Anderson was promoted by EDS to the position of Manager of Investments and Debt in the Domestic Treasury Department wherein Petitioner was responsible for all domestic short and long term investments for all EDS pension portfolios, corporate portfolios, and Title IX portfolios. (Plaintiff's Response, p. 4, No. 5).

On August 23, 1989 Petitioner was terminated from his employment with EDS. (Plaintiff's Response, p. 18, No. 21). In response, Petitioner filed Plaintiff's Original Petition in the District Court of Dallas County, Texas, on June 26, 1991. Therein, Petitioner alleged five (5) claims against the Respondent and various employees of the Respondent including wrongful discharge, intentional and/or negligent infliction of emotional harm, tortious interference, and breach of contract. The gravamen of Petitioner's complaint was that Petitioner had been wrongfully discharged as a result of his refusal to violate certain laws, including, but not limited to, certain provisions of ERISA. (Plaintiff's Original Petition, p. 5). The alleged illegal acts which the Petitioner was instructed to perform can be summarized as follows:

1. Petitioner was instructed to sign, on two (2) separate occasions, approval of payment of invoices without approval of the pension trustees;

2. Petitioner was instructed to intentionally fail investment transactions made on behalf of EDS;

3. Petitioner was instructed to write up minutes for meetings which he did not attend in connection with the EDS retirement plan; and

4. Petitioner was instructed to falsify interest income projections.

As a basis for removing this action to the United States District Court, Respondent and the other defendants improperly relied upon the references to ERISA and filed for removal alleging Petitioner's Petition constituted "a cause of action for retaliatory discharge for reporting ERISA violations." (Defendants' Civil Cover Sheet). Thereafter, Petitioner filed Plaintiff's First Amended Original Complaint wherein all references to ERISA were removed. Petitioner also filed Plaintiff's Motion to Remand and a Brief in Support wherein Petitioner argued the mere references to ERISA were insufficient to invoke federal question jurisdiction. (Brief in Support of Plaintiff's Motion to Remand, p. 2). Petitioner also argued that the filing of Plaintiff's First Amended Complaint, which eliminated references to ERISA, eliminated any possible federal question jurisdiction. (Brief in Support of Plaintiff's Motion to Remand, p. 2). Similarly, based on Petitioner's assertion that this action was improperly removed to the United States District Court, the District Court did not have proper jurisdiction to render any decisions in this case, including, but not limited to, those pertaining to the summary judgment motion of the Respondent.

ARGUMENT

Rule 10 of the Revised Rules of the Supreme Court of the United States provides in part that a Petition for a Writ of Certiorari may be granted when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court. Rule 10 also recognizes that the Rule itself is neither controlling nor fully measures the Court's discretion with respect to granting writs.

In this case, Petitioner contends that the District Court erred in finding that his state law cause of action for wrongful discharge for refusing to violate certain federal and state laws (including ERISA) and reporting certain violations of such laws "relate to" ERISA. Similarly, regardless of whether the District Court erred in finding that Petitioner's state law cause of action "relates to" ERISA, the District Court erred in applying the doctrine of complete preemption instead of the well-pleaded complaint rule. Because the claims asserted by Petitioner do not fall within the scope of ERISA's civil enforcement provision, the application of complete preemption was improper.

PROPOSITION I

THE DISTRICT COURT IMPROPERLY DETERMINED THAT THE PETITIONER'S CLAIMS WERE RELATED TO ERISA.

Although this Court has given expansive construction to ERISA provisions, this Court has also recognized

limits to ERISA's preemption clause. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Mackey v. Lanier Collection Agency & Ser., Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). This Court has held "[t]he mere existence of a federal regulatory or enforcement scheme, however, even a considerably detailed one, does not by itself imply preemption of state remedies." *McClendon*, 498 U.S. at 143, 111 S.Ct. at 485 (citing *English v. General Elec. Co.*, 496 U.S. 72, 87, 110 S.Ct. 2270, 2279, 110 L.Ed.2d 65 (1990)). Moreover, this Court has declared "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983). The Petitioner's case is exactly the sort of state action referenced in *Shaw*.

The claims asserted by Petitioner in this case require neither a construction of federal law nor the resolution of a substantial question of federal law. In its opinion below, the Fifth Circuit recognized that Petitioner's state court petition alleged no federal cause of action. *Anderson v. Electronic Data Systems Corp.*, 11 F.3d at 1311, 1313 (5th Cir. 1994), reprinted *infra* at A5. As such, removal was improper. Only where the plaintiff's complaint clearly establishes that the claim is one necessarily arising under federal law will the federal issue suffice to support removal to federal court. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1,11, 103 S.Ct. 2841, 2486-87, 77 L.Ed.2d 420 (1983).

In *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), Willy sued his former employer for wrongful discharge

arising from Willy's refusal to violate federal environmental and securities laws and for reporting his employer's violation thereof. In finding that the District Court erred in denying Willy's motion to remand, the Fifth Circuit stated:

> Our conclusion in this connection is strengthened by our view that the federal issues in Willy's claim are not ones in the forefront of the case, but are more collateral in nature, and are not substantial in relation to the claim as a whole, which is in essence one under state law. *The Texas common law doctrine stated in Sabine Pilot is one intended to protect the rights of any employees, and whether the law that they are fired for refusing to violate is state or federal, environmental or otherwise, is wholly immaterial.*

Id. at 1170. (Emphasis added). The Fifth Circuit thus directed the district court to remand the case to state court. *Id.*

In *Sperling v. Texas Health Enterprises, Inc.*, 791 F.Supp. 662 (S.D. Tex. 1992), the court determined that the plaintiffs' claims for wrongful discharge arising from plaintiffs' refusal to participate in their former employer's injury plan did not "relate to" ERISA so as to support removal. *Sperling*, 791 F.Supp. at 664-665. Noting only state laws that "relate to" an ERISA plan are preempted by ERISA, the *Sperling* court found ERISA did not have a preemptive effect on the plaintiffs' claims despite that the employees' claim required consideration of evidence regarding the terms of their employer's ERISA plan. *Sperling*, 665 F.Supp. at 664-665. *See also, Nowoc v. Rheem Mfg. Co.*, 772 F.Supp. 977 (S.D. Tex. 1991) (Where ERISA is a collateral issue in a wrongful termination case, removal is

improper since the wrongful termination is a matter decided by Texas employment law); and *Zack v. Howard*, 658 F.Supp. 73 (N.D. Ill. 1987) (Fact that plaintiff's complaint made explicit reference to federal statutes not sufficient to warrant removal).

Respondent and other defendants sought removal of this action on the basis that Petitioner's claims arose under federal law. However, all the claims asserted by Petitioner were based solely on Texas state law. Specifically, Petitioner's wrongful discharge claim is based on Texas state employment law which allows the plaintiff recovery where an employer has discharged an employee for refusing to violate a law. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). With respect to recovery pursuant to *Sabine Pilot*, the type of law (e.g. state v. federal) which the employee refuses to violate is immaterial. *Willy*, 855 F.2d at 1170. Nonetheless, the Respondent, in the Defendants' Response to Plaintiff's Motion to Remand, misconstrued Petitioner's Petition as one alleging "wrongful discharge arising under § 510 of ERISA, 29 U.S.C. § 1140." Respondent based this argument on the fact that Petitioner's wrongful discharge claim is grounded, in part, on Petitioner's refusal to violate certain laws, including ERISA laws governing management of ERISA pension plans. However, ERISA is only relevant insofar as it was one of the types of laws Petitioner refused to violate. As such, it is purely collateral and incidental to Petitioner's claims.

Petitioner's Original Petition refers to ERISA as one of the laws Petitioner refused to violate, thereby resulting in Petitioner's wrongful discharge. However, it is clear that such reference does not constitute grounds for

removal unless such reference requires resolution of a substantial federal question. *Franchise Tax Bd.*, 463 U.S. at 10, 103 S.Ct. at 2847. Under the well-pleaded complaint rule, it is clear that Anderson's claims are not removable because the claims, as read from the face of the Original Petition, do not require resolution of any substantial federal question.

Respondent has attempted to equivocate wrongful termination, a common law cause of action grounded solely in state law, with violations of substantive ERISA law. However, in no way can it be said that Petitioner's refusal to violate ERISA constitutes a "substantially federal" question as is required for removal under *Franchise Tax Board*. Whether Petitioner was wrongfully terminated for refusal to break a state law or federal law does not change the fact that Petitioner's wrongful termination is a state law claim; in no way, shape, or form is Petitioner's claim a federal question. Thus, it is clear Petitioner's claims were not properly subject to removal and the District Court's refusal to remand said claims constitutes a clear error of law.

PROPOSITION II

THE FIFTH CIRCUIT ERRED IN FAILING TO APPLY THE "WELL PLEADED COMPLAINT" RULE BY IMPROPERLY RELYING ON *TAYLOR* TO FIND THE COMPLETE PREEMPTION DOCTRINE APPLICABLE.

In its opinion below, the Fifth Circuit relies on *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), to find that Petitioner's claim was subject to removal jurisdiction. *Anderson*, 11 F.3d at 1315,

reprinted *infra* at A9-A10. Specifically, the Fifth Circuit stated that in *Taylor*, this Court ruled that "causes of action within the scope of the civil enforcement provisions of ERISA § 502(a) are subject to the complete preemption doctrine and removable to federal court." *Id.* (citing *Taylor*, 481 U.S. at 66-67, 107 S.Ct. at 1548). Pursuant to the complete preemption doctrine, the Fifth Circuit found Petitioner's claim was removable to federal court. *Anderson*, 11 F.3d at 1315, reprinted *infra* at A10.

However, it is important to note that the complete preemption doctrine espoused by this Court in *Taylor* is confined to causes of action which fall within the civil enforcement provisions of ERISA § 502(a). *Taylor*, 481 U.S. at 66, 107 S.Ct. at 1548. In *Taylor*, the plaintiff, a car accident victim, sought to recover benefits under an employee benefit plan covered by ERISA. After a dispute arose regarding plaintiff's rights under the ERISA plan, plaintiff sued in state court to recover disability benefits. The plaintiff further asserted state law claims for compensation for mental anguish, wrongful termination, and wrongful failure to promote. *Taylor*, 481 U.S. at 61, 107 S.Ct. at 1545. Although recognizing the plaintiff had asserted only state law causes of action, this Court found that the plaintiff's claims in *Taylor* fell within the scope of ERISA § 502(a)(1)(B). *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546.

In deciding whether removal jurisdiction is proper, this Court in *Taylor* recognized that "the 'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal courts." *Taylor*, 481 U.S. at 63, 107 S.Ct. at 1546 (citing *Franchise Tax Bd.*). This Court further recognized that "a

cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Id.* (citing *Gully v. First Nat. Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)). This Court also noted that "[f]ederal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* This Court recognized, however, one corollary of, or exception to, the well-pleaded complaint rule is that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546.

In *Taylor*, this Court found that the text and the legislative history of ERISA shows clear congressional intent to make "§ 502(a)(1)(B) suits brought by participants and beneficiaries federal questions for the purposes of federal court jurisdiction. . . . " *Taylor*, 481 U.S. at 66, 107 S.Ct. at 1547. Because Congress manifested such an intent to make any causes of action within the scope of ERISA § 502(a) removable to federal court, the plaintiff's claims in *Taylor*, which fell within ERISA § 502(a)(1)(B), were deemed properly removable by this Court. *Taylor*, 481 U.S. at 66-67, 107 S.Ct. at 1548.

In analyzing this Court's holding in *Taylor*, it is vital to note that application of the complete preemption doctrine is restricted only to those cases where a plaintiff's claims fall within the scope of ERISA § 502(a) so as to create a claim sufficiently federal in character. Thus, removability under *Taylor* requires: (1) that the state law claims asserted in the complaint are preempted by

ERISA; and (2) the state law claims fall within the scope of the civil enforcement provision of ERISA, § 502(a). *Taylor*, 481 U.S. at 64-66, 107 S.Ct. at 1546-48. Stating the standard another way, *Taylor* requires that "a state law cause of action designed to remedy a particular wrong and preempted by ERISA is not removable unless ERISA provides a civil remedy for the wrong as well." *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480, 1482 (D. Minn. 1991) (citing *Taylor*, 481 U.S. at 64-66, 107 S.Ct. at 1547). In this respect, it is helpful to refer to the decision in *Franchise Tax Bd.* wherein this Court found that ERISA preemption, without more, will not convert a state claim into an action arising under federal law. *Franchise Tax Bd.*, 463 U.S. at 25-27, 103 S.Ct. at 2854-2855.

As the Fifth Circuit recognized in its opinion below, Petitioner alleged no federal cause of action in his state court petition. *Anderson*, 11 F.3d at 1313, reprinted *infra* at A5. Moreover, as more fully set forth below in Proposition III, Petitioner's state law claims do not fall within the scope of the civil enforcement provision of ERISA, § 502(a). In order for removal of Petitioner's claims to be appropriate under the doctrine of complete preemption, *Taylor* requires: (1) that Petitioner's state law claims, as set forth in Petitioner's state court petition, are preempted; and (2) that Petitioner's state law claims fall within the scope of ERISA's civil enforcement provision, § 502(a). In Petitioner's case, it is clear that the second prong of the complete preemption test, as set forth in *Taylor*, is not satisfied; Petitioner's state law claims for wrongful discharge, intentional and/or negligent infliction of emotional harm, tortious interference, and breach of contract, do not fall within the scope of ERISA § 502(a).

Because the complete preemption doctrine is inapplicable to Petitioner's case, it is clear that the Fifth Circuit erred in not applying the well-pleaded complaint rule.

PROPOSITION III

PETITIONER'S CLAIMS DO NOT FALL WITHIN THE SCOPE OF ERISA § 502(a) OR § 510.

It is axiomatic that ERISA § 502(a) provides no cause of action whatsoever for wrongful discharge for refusing to violate ERISA and reporting violations of ERISA. In its opinion below, the Fifth Circuit intimates that Petitioner, as a participant and fiduciary with respect to an ERISA plan, is afforded a right or remedy pursuant to ERISA § 502(a). *Anderson*, 11 F.3d at 1314, reprinted *infra* at A7. However, the Fifth Circuit failed to state which section of § 502(a), if any, would be applicable to Petitioner's claims. The fact of the matter is that Petitioner's claims do not fall within the scope of ERISA § 502(a).

Turning first to ERISA §§ 502(a)(5) and (6), it is clear those sections apply only to civil enforcement by the Secretary of Labor, and as such, such provisions are plainly inapplicable to the case at bar. Further, it is clear that Petitioner's claims have nothing to do with an administrator's Internal Revenue registration, and as such, ERISA § 502(a)(4) is also inapplicable to this case.

Next, it must be considered whether Petitioner's claims fall within the scope of § 502(a)(1). ERISA § 502(a)(1) permits a beneficiary's or participant's access to ERISA plan information and allows a beneficiary or participant to bring an action to: recover his benefits under the plan; enforce his rights under the terms of the

plan; or to clarify his rights to future benefits under the plan. Even if Petitioner was a participant and a fiduciary with respect to an ERISA plan, ERISA § 502(a)(1) is not applicable to Petitioner's case. Petitioner brought suit against Respondent for state law wrongs arising from Petitioner's wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws. Petitioner's claims have nothing to do with recovery of benefits under a plan, enforcing Petitioner's rights as a participant under a plan, or clarifying future rights or benefits under a plan. As such, Petitioner's claims simply do not fall within the scope of ERISA § 502(a)(1).

Further, Petitioner's claims do not fall within the scope of ERISA § 502(a)(2) which permits the Secretary of Labor, a participant, beneficiary, or fiduciary to sue for a breach of fiduciary duty pursuant to ERISA § 409, 29 U.S.C. § 1109. Clearly, Petitioner is not suing for a breach of fiduciary duty and as such, ERISA § 502(a)(2) is inapplicable to the case at bar.

Finally, it is equally clear that Petitioner's claims do not fall within the scope of ERISA § 502(a)(3). Specifically, ERISA § 502(a)(3) provides that a civil action may be brought, "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

In this case, Petitioner is not seeking to enjoin any act or practice which violates the provisions of ERISA, nor is

Petitioner seeking to obtain any equitable relief to redress ERISA violations or to enforce ERISA provisions. Petitioner has simply sought money damages arising from his wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws.

With respect to the scope of ERISA § 502(a)(3), it is helpful to refer to the court's analysis in *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480 (D. Minn. 1991). In *McLean*, the plaintiff sued her employer pursuant to a Minnesota whistle-blower statute (Minn. Stat. § 181.932) for wrongful discharge for reporting purported ERISA violations to her employer. *McLean*, 777 F.Supp. at 1481. In determining whether the plaintiff's claims fell within the scope of § 502(a)(3), the *McLean* court noted, "the parties have not cited, and the court has not found, an ERISA provision which provides plaintiff the specific right to report violations of federal law to her superiors or those responsible for the plan's administration." *McLean*, 777 F.Supp. at 1484. Ultimately, in order to satisfy the complete preemption doctrine as set forth in *Taylor*, the *McLean* court was forced to infer that ERISA provided a cause of action for "whistle-blowing" with respect to ERISA violations. To be sure, there is no such relief provided in ERISA. Giving all due deference to the *McLean* court, even if ERISA impliedly provides a remedy for "whistle-blowing", it does not stand to reason that it also provides a remedy for termination for the refusal to violate ERISA. To imply that ERISA also supplies a remedy for discharge for refusing to violate ERISA goes well beyond the realm of reason. Because Congress chose not to provide employees a cause of action under ERISA for

wrongful discharge for refusing to violate ERISA, courts cannot do so.

Based on the foregoing, it is clear that the Petitioner's claim for wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws does not fall with the scope of ERISA § 502(a). This being the case, it is clear that the complete preemption test set forth in *Taylor* has not been satisfied.

In discussing the import of ERISA § 510, the Fifth Circuit relied heavily on this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Therein, the plaintiff alleged he was discharged, in part, because his employer was attempting to avoid making contributions to the plaintiff's pension plan. *McClendon*, 498 U.S. at 135-36, 111 S.Ct. at 481. As the Fifth Circuit noted in its opinion below, this Court found that the plaintiff's claim in *McClendon* fell squarely within the purview of ERISA § 510. Considering that ERISA § 510 prohibits the discharge of a plan participant "for the purpose of interfering with the attainment of any right to which a participant may become entitled under the plan, this title . . . ," this Court's conclusion in *McClendon* was plainly correct because the employee's discharge constituted interference with that employee's rights under the employee benefit plan involved therein.

In its opinion below, the Fifth Circuit did a fine job summarizing the import of ERISA § 510, stating "§ 510 addresses discharges for exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA." *Anderson*, 11 F.3d at 1315,

reprinted *infra* at A7-A8. The Fifth Circuit went on to hold that just as the plaintiff's claim in *McClendon* fell within the scope of ERISA § 510, so too did Petitioner's. *Id.* at 1314, reprinted *infra* at A7. However, based on the Fifth Circuit's own construction of § 510, it is axiomatic that Petitioner's claim does not "fall squarely within the ambit of ERISA § 510." Petitioner's claims do not arise from a discharge for exercising ERISA rights. Petitioner's claims do not arise from a discharge for the purpose of interfering with the attainment of ERISA rights. Petitioner's claims do not arise from a discharge for providing information or testimony related to ERISA. Rather, Petitioner's claims did arise from a discharge for refusing to violate state and federal law and reporting certain violations of such laws. As such, it is clear Petitioner's claims do not come within the scope of ERISA § 510 and that therefore, ERISA § 510 is not applicable. Petitioner concedes that ERISA § 510 would be applicable if Petitioner's state law petition was filed against Respondent to correct what Petitioner perceived to be violations of ERISA. However, such is not the case. Rather, as mentioned above, Petitioner's claims arose from a discharge for refusing to violate state and federal laws and reporting certain violations of such laws.

Because Petitioner's claims clearly do not fall within the scope of either ERISA § 502(a) or § 510, as explained fully above, the Fifth Circuit has, by improperly applying the doctrine of complete preemption in this case, left Petitioner without any remedy. As such, Petitioner is entitled to relief from this Court.

CONCLUSION

To understand the impact of the Fifth Circuit's opinion in *Anderson* is to realize that whenever an employee suing for wrongful discharge so much as mentions "ERISA" in his or petition, that cause of action must be removed to federal court. Yet even more disturbing is the realization that under the Fifth Circuit's construction of ERISA provisions, an employer-defendant may remove a wrongful discharge cause of action to federal court merely by referring to ERISA in its answer. What is still more egregious about the Fifth Circuit's opinion in *Anderson* is that under *Anderson*, a plaintiff may be foreclosed from his or her sole remedy where: (1) a defendant removes the cause of action pursuant to ERISA preemption; and (2) ERISA provides neither a claim, nor relief for the wrong.

The Congress intended for ERISA to be afforded broad application and the courts have generally adhered to this intent. However, to suggest that the Congress intended ERISA to apply to state law claims for wrongful discharge based on a refusal to violate state and federal laws, including ERISA provisions, is an extension that cannot be supported.

In its opinion below, the Fifth Circuit found that Petitioner's claims were removable pursuant to *Taylor*. In so finding, the Fifth Circuit necessarily had to find that the Petitioner's claims fall within the scope of ERISA's civil enforcement provision, § 502(a). Plainly, the Petitioner's state law claims for wrongful discharge for refusing to violate state and federal laws do not fall within the

scope of ERISA § 502(a). As such, the complete preemption doctrine, as espoused in *Taylor*, is inapplicable to Petitioner's case. Therefore, as to the Petitioner's claims, the "well-pleaded complaint rule" governs removability. The Fifth Circuit explicitly concedes that Petitioner's state court petition did not allege any federal causes of action. Therefore, the Fifth Circuit's failure to remand Petitioner's causes of action to state court as required by the well-pleaded complaint rule constitutes clear error which requires the review of this Court.

In light of the foregoing, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HAMMONS & HUNTER

CHERYL P. HUNTER
50 Penn Place
Suite 1300
Oklahoma City, Oklahoma 73118
(405) 848-2255

Attorneys for Petitioner,
George Raymond Anderson

APPENDIX A

George Raymond ANDERSON, a/k/a Andy Anderson, Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS CORP., et al., Defendants-Appellees.

No. 93-1606
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1994.

Former employee brought suit against former employer and coemployees for wrongful discharge, and asserted other state common-law claims. Defendants removed action from Texas state court. Summary judgment was granted in favor of defendants by United States District Court for the Northern District of Texas, A. Joe Fish, J., with regard to claims that were not voluntarily dismissed, and former employee appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) claims that former employee was demoted and discharged for refusing to commit illegal acts and for reporting the activity of another employee, which involved pension plans, were preempted by ERISA, and (2) former employee's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations fell within scope of civil enforcement provisions of ERISA, creating removal jurisdiction, even though preemption was raised only as defense.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

George Anderson brought this suit in state court against his former employer, Electronic Data Systems Corporation (EDS), and others. He asserted state common law causes of action for wrongful discharge, tortious interference with prospective business and contractual relationships, and infliction of emotional distress. The defendants removed the case to federal court and were either voluntarily dismissed or obtained summary judgments. On appeal, Anderson does not directly challenge the summary judgments, but instead asks us to vacate the judgments and direct the remand of the case to state court, on grounds that the district court lacked subject matter jurisdiction. Because we conclude that the district court had jurisdiction by virtue of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, we affirm.

BACKGROUND

Anderson's suit was originally filed in Texas state court against EDS and four present or former EDS employees. His state court petition asserted numerous facts and claims on which our analysis of jurisdiction rests. Regarding the general nature of his employment with EDS, the petition alleges:

> On October 15, 1984, Anderson was employed by Defendant EDS for a managerial position in the Domestic Treasury Department of Defendant EDS. From October 1984 to October 1985, Anderson served as the Cash Manager in the Domestic Treasury Department, where his responsibilities included management of all cash operations, short term investments, cash forecasting, and related information systems plus consulting with various groups within the EDS system. In October of 1985, Plaintiff was promoted to [the] position of Manager of Investments and Debt in the Domestic Treasury Department. In that position, Plaintiff had responsibilities for all domestic short and long-term investments for all pension portfolios, corporate portfolios, and Title IX portfolios. In this position, Plaintiff was charged with the responsibility of administering investment assets totaling approximately 1.3 billion dollars.

The petition alleges that Anderson was demoted and discharged for his refusal to commit illegal acts and for reporting the activities of another employee, Douglas Crow. It asserts that Anderson was asked by Crow to commit certain illegal acts, and gives four examples. Two of the examples involved the EDS pension plans. Anderson claimed that the illegal acts included:

> Being asked to sign on two separate occasions approval or payment invoices on behalf of the pension portfolios under his management and supervision who [sic] had been retained by Crow without approval of the pension trustees. Such action would have been a violation of the Federal Employee Retirement Income Security

> Act of 1974 ("Erisa") Laws governing management of such pension plans.
>
> * * *
>
> Plaintiff was also asked to write up minutes for meetings which he did not attend in connection with the EDS Retirement Plan. This also is in violation of ERISA.

The petition alleges that Anderson refused to commit these acts, and reported these incidents and other improper conduct by Crow to management. It further alleges that Anderson was demoted and then discharged because of his "refusal to commit illegal activities at Crow's request and because of his reporting Crow's own illegal or irregular activities to EDS Management." The petition asserted a cause of action for wrongful discharge, on the theory that under Texas law employment-at-will contracts cannot be terminated because of the employee's refusal to commit an illegal act. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex.1985).

The defendants removed the case to federal court. Anderson filed an amended complaint deleting all references to ERISA. Defendant Crow filed a motion for summary judgment, which the court granted. Anderson moved to remand the case to state court in conjunction with filing his response to Crow's summary judgment motion. Anderson later dismissed all other defendants except EDS, and dismissed all claims except for the wrongful discharge claim. The district court denied the motion to remand and granted summary judgment as to the remaining claim.

On appeal Anderson does not challenge the summary judgments on the merits. Instead, he claims that the district court lacked subject matter jurisdiction, and asks that we vacate the summary judgments entered by the district court and direct the remand of the case to state court.

DISCUSSION

The state court petition did not allege any federal causes of action. EDS claims that the case was properly removed by virtue of the federal preemption afforded by ERISA. We are hardly writing on a clean slate, as the subject of federal preemption under ERISA has generated a wealth of jurisprudence. We face two related questions. The first is whether the claims asserted by Anderson are preempted by ERISA. The second is whether ERISA's "total preemption" doctrine applies to create federal question jurisdiction which will support removal of the case to federal court.

The Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), provides guidance to our case. There, an employee brought a state court action against his employer alleging wrongful discharge. The employee claimed that one of the reasons for his discharge was the employer's desire to avoid making contributions to his pension plan, which allegedly would have vested in another four months. The case eventually reached the Texas Supreme Court, which held that a plaintiff could recover in a wrongful discharge action if he established that the principal reason for his

termination was the employer's desire to avoid contributing to its pension plan. *Id.*, 498 U.S. at 135-36, 111 S.Ct. at 481. The United States Supreme Court reversed, holding that such a cause of action was preempted by ERISA's broad preemption provision, ERISA § 514, 29 U.S.C. § 1144, which preempts state laws which "relate to" an ERISA benefit plan. The Court reaffirmed its prior decisions noting that the preemption provision is "deliberately expansive" and "designed to 'establish pension plan regulation as exclusively a federal concern,' " and that a law relates to an ERISA plan "if it has a connection with or reference to such a plan." 498 U.S. at 139, 111 S.Ct. at 482-83 (citations omitted). The Court found that the wrongful discharge claim related to an ERISA plan and was hence preempted since "the existence of a pension plan is a critical factor in establishing liability under that State's wrongful discharge law." *Id.*, 498 U.S. at 140, 111 S.Ct. at 483. As a further ground for finding preemption, the Court found that the state wrongful discharge cause of action would conflict with the express and carefully crafted enforcement provisions found in the ERISA statute, specifically §§ 510 and 502(a)(3), (e), 29 U.S.C. §§ 1140, 1132(a)(3), (e). In describing the significance of § 502(a), the Court turned to one of its prior decisions, which had explained:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the

> federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

McClendon, 498 U.S. at 144, 111 S.Ct. at 485 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987)).

McClendon compels us to conclude that Anderson's wrongful discharge claim is preempted insofar as it is based on his refusal to carry out violations of ERISA, and reporting such violations to management. As in *McClendon*, such a claim depends on the existence of a pension plan, and therefore relates to an ERISA plan. Further, such a claim conflicts with the detailed and carefully balanced remedy provisions of ERISA. Section 502(a) provides remedies for participants, beneficiaries, and fiduciaries of ERISA plans. Anderson was both a participant and, given the allegations in his petition regarding his management of pension portfolios, a fiduciary.[1] In addition, as in *McClendon*, Anderson's "claim falls squarely within the ambit of ERISA § 510." 498 U.S. at 142, 111 S.Ct. at 485. Section 510 addresses discharges for exercising ERISA rights or for the purpose of interfering with

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[1] ERISA defines a participant as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . . " 29 U.S.C. § 1002(7). ERISA also provides that "a person is a fiduciary with respect to a plan to the extent . . . he exercises . . . any authority or control respecting management or disposition of its assets [or] he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has authority or responsibility to do so. . . . " *Id.* § 1002(21)(A).

the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA.[2]

Hence, we conclude that a state wrongful discharge cause of action based on a refusal to commit violations of ERISA and reporting such violations to management is preempted by ERISA, because such a claim relates to an ERISA plan and is expressly preempted by ERISA § 514, and because the cause of action would conflict with the enforcement provisions of §§ 502(a) and 510 of ERISA.[3]

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[2] Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter. . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140.

[3] The Sixth Circuit reached a similar conclusion in *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir.), *cert. denied*, 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 177 (1985). There, the plaintiff brought a state law wrongful discharge action, alleging that he was terminated for fulfilling his obligations under ERISA by writing a letter to plan participants. The court found the claim preempted, concluding that "allowing the remedies available to an ERISA fiduciary discharged for complying with ERISA to turn upon the state of his employment and a state court's interpretation of ERISA's provisions runs contrary to Congress' desire to establish a uniform federal law regulating pension plans." *Id.* at 802.

As we have previously noted, such a finding of preempting does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong.[4]

A finding that a claim is preempted does not end our analysis, since preemption is raised as a defense and ordinarily federal question jurisdiction is determined by the well-pleaded complaint rule, which looks to the complaint in determining subject matter jurisdiction. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 62-64, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). However, in *Taylor,* the Supreme Court held that the "complete preemption" doctrine applies to certain ERISA cases. Under this doctrine, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character," and the case may be removed even if no federal claim is asserted in the complaint and federal preemption, raised as a defense, is the only issue of federal law implicated in the case. *Id.,* 481 U.S. at 62-64, 66-67, 107 S.Ct. at 1546, 1548. The Court held that causes of action within the scope of the civil enforcement provisions of ERISA § 502(a) are subject to

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[4] *Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321, 1333 (5th Cir.) ("The acknowledged absence of a remedy under ERISA's civil enforcement scheme . . . does not alter our conclusion. . . . [T]he lack of an ERISA remedy does not affect a pre-emption analysis."), *cert. denied,* ___ U.S. ___, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992); *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 979 (5th Cir. 1991) ("This Court has held that ERISA's preemption provision bars state law causes of action even though such preemption may leave a victim . . . without a remedy.").

the complete preemption doctrine and removable to federal court. *Id.*, 481 U.S. at 66-67, 107 S.Ct. at 1548.

In *Taylor*, the plaintiff was injured in a car accident. His employer had a disability plan covered by ERISA. When a dispute arose regarding plaintiff's benefits under the plan, he brought a state court suit seeking recovery of his disability benefits, as well as asserting claims for mental anguish, wrongful termination and wrongful failure to promote him. The Court held that, as a suit by a beneficiary to recover benefits from a covered plan, the suit fell directly under the civil enforcement provisions of ERISA and was therefore preempted. *Id.*, 481 U.S. at 62-64, 107 S.Ct. at 1546. It further held that the common law tort and contract claims all "related to" an ERISA benefit plan and were hence preempted under ERISA § 514(a), 29 U.S.C. § 1144(a). *Id.*

Applying the reasoning of *Taylor* to our case, we hold that Anderson's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations falls within the scope of the civil enforcement provision of ERISA, and hence created removal jurisdiction.[5] Section 502(a) creates a cause of action for any participant, beneficiary, or fiduciary seeking to enjoin any act which violates any provision of ERISA, or seeking

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[5] The same conclusion was reached in the case relied upon by the district court, *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480 (D.Minn.1991). The *McLean* court found that a wrongful discharge action alleging that the employee had been discharged for reporting to her employer violations of federal law in connection with the administration of the employer's employee benefit plan was removable to federal court. *Id.* at 1483.

recovery to the plan for any losses resulting from a fiduciary's breach of his responsibilities, obligations, or duties imposed by ERISA. 29 U.S.C. §§ 1109, 1132(a)(2)-(3).[6] ERISA § 510 broadly prohibits the termination or other adverse treatment of participants and beneficiaries for exercising their ERISA rights or for the purpose of interfering with the attainment of such rights, and prohibits the discharge or other adverse treatment of any person because he has given information or testimony relating to ERISA. 29 U.S.C. § 1140. Further, this section expressly provides that the § 502 civil enforcement provisions of ERISA "shall be applicable to the enforcement of this section." *Id.*

One novel aspect of this case is that Anderson asserted that the ERISA violations he reported and refused to commit were only some of the illegal acts which led to his discharge. He also alleged, for example, insider trading and other violations of laws and regulations enforced by the Securities and Exchange Commission. However, the allegations of these other wrongful acts does not alter our analysis.[7] To hold otherwise, we

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[6] Section 502(a) is not confined to enforcing claims for benefits due under ERISA plans. As the Supreme Court explained in *McClendon*, "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' . . . Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits." 498 U.S. at 145, 111 S.Ct. at 486.

[7] Of course, the general federal removal statute allows an entire case to be removed so long as federal question jurisdiction exists with respect to a "separate and independent claim or cause of action" asserted in the complaint. 28 U.S.C. § 1441(c). In our case, however, it does not appear that any of Anderson's

believe, would fail to recognize that the ERISA preemption provision is " 'deliberately expansive' . . . [and] is to be construed extremely broadly." *Corcoran*, 965 F.2d at 1328 (citation omitted). "The Supreme Court has consistently emphasized the expansiveness of the 'relate to' standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern." *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1217 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992). Finally, we note that Anderson's deletion of references to ERISA by amending his complaint did not divest the district court of jurisdiction to decide the summary judgment motions.[8]

AFFIRMED.

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causes of action are premised entirely on the alleged ERISA violations described in his original petition.

[8] *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir.1990) ("[W]hen there is a subsequent narrowing of the issues such that the federal claims are eliminated and only pendent state claims remain, federal jurisdiction is not extinguished."); *In re Carter*, 618 F.2d 1093, 1101 (5th Cir.1980) ("It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. . . . Indeed, it has often been stated that the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction."), *cert. denied*, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE RAYMOND (ANDY) ANDERSON,	)	
Plaintiff,	)	CIVIL ACTION NO.
VS.	)	3:91-CV-1489-G
ELECTRONIC DATA SYSTEMS CORP., ET AL.,	)	
Defendant.	)	

MEMORANDUM ORDER

(Filed Dec. 2, 1992)

Before the court is the motion for summary judgment and for sanctions of defendant Douglas M. Crow ("Crow"). For the reasons stated below, Crow's motion for summary judgment is granted and his motion for sanctions is denied.

I. BACKGROUND

This action arises from the decision of defendant Electronic Data Systems ("EDS") to terminate, on August 23, 1989, the employment of plaintiff George Raymond Anderson ("Anderson"). Anderson alleges that Crow and the other defendants terminated his employment at EDS in retaliation for his refusal to participate in illegal activities and for his accusations of irregular conduct against

Crow, his superior in the organization. Anderson also seeks damages for emotional distress he claims to have suffered at the hands of defendants as a result of his refusal to perform the requested illegal acts.

Anderson further asserts that defendants have tortiously [sic] interfered with his ability to find gainful employment since his termination from EDS. Specifically, he maintains that Crow tortiously [sic] interfered with his attempts to find employment elsewhere by contacting potential future employers and discouraging them from extending offers of employment to him.

Crow filed this motion for summary judgment on November 15, 1991. On December 5, 1991, Anderson filed a timely response accompanied by his sworn affidavit requesting that the court grant him an extension of time so that he could better respond to Crow's motion. Not only did this court grant Anderson an initial extension, it also granted him a second extension on August 5, 1992. In its August 5 order, the court ordered Anderson to file any response no later than September 8, 1992. As of the date of this order, however, Anderson has not filed a response.

II. ANALYSIS

A. Legal Standard for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled

to judgment as a matter of law. Fed. R. Civ. P. 56(c).[1] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, he must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against a party if after adequate time for discovery, he fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, above, 477 U.S. at 322-23.

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[1] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

B. Anderson's Claims

1. Wrongful Termination

Anderson first allegation is that Crow wrongfully terminated his employment at EDS. To support this allegation, Anderson must provide some evidence that Crow played a role in his firing. *See Crawford & Company v. Garcia*, 817 S.W.2d 98, 102 (Tex. App. – El Paso 1991, writ denied) (only a party who actually conducts or recommends termination can be guilty of wrongful discharge). Such evidence is conspicuously absent from Anderson's response. In fact, the affidavits of both Crow and Don W. Ulm, Anderson's immediate supervisor at the time of his firing, state that Ulm made the decision to terminate Anderson. These sworn statements verify that Crow played no role in the decision to dismiss Anderson. Absent *any* evidence to the contrary, Crow is entitled to judgment as a matter of law on Anderson's claim of wrongful termination.

2. Tortious Interference

In his complaint, Anderson alleges that Crow tortiously interfered with his prospective business and contractual relationships. "To prevail on a claim of tortious interference with business relations under Texas law, a plaintiff must prove (1) the existence or prospect of a contract, (2) an intentional and willful act interfering with the contract that was calculated to cause damage to the plaintiff, and (3) damages." *Kiepfer v. Beller*, 944 F.2d 1213, 1220 (5th Cir. 1991); *see also Sterner v. Marathon Oil Company*, 767 S.W.2d 686, 689 (Tex.1989) (Texas law protects

prospective, as well as existing, contracts from interference).

In support of his claim for tortious interference, Anderson relates conversations that took place during two separate job interviews he had in the wake of his dismissal from EDS. During the course of those interviews, John F. Hughes and J. Abbot Sprague – each the representative of a prospective employer – commented to Anderson that they knew Crow and would be contacting him before making a hiring decision. Although both interviews went well, Anderson was not offered either job. He opines that his failure to receive a job offer from either Hughes or Sprague must have been the result of Crow's tortious interference.

Anderson offers no evidence, however, to support his theory that Crow interfered with his post-EDS job opportunities. To the contrary, affidavits of both Hughes and Sprague state unequivocally that neither man ever had any contact with Crow regarding Anderson's employment. Anderson's speculation notwithstanding, the evidence fails, as a matter of law, to show that Crow intentionally or willfully interfered with Anderson's quest for future employment. Accordingly, Crow is also entitled to judgment on this claim.

3. Infliction of Emotional Distress

Anderson further alleges that Crow negligently or intentionally inflicted emotional distress on him in retaliation for his refusal to perform illegal acts. Texas is one

of many states recognizing the tort of intentional infliction of emotional distress. *Duty v. General Finance Company*, 273 S.W.2d 64, 65-66 (Tex. 1954). "To prevail on a claim for intentional infliction of emotional distress, Texas law requires the plaintiff to prove the following: (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the actions of the defendant caused the plaintiff emotional distress, and (4) that the emotional distress suffered was severe." *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992) (citing *Tidelands Auto Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. – Beaumont 1985, writ ref'd n.r.e)).

Anderson has produced no evidence to support his claim that Crow intentionally caused him emotional distress. In response to Crow's interrogatory regarding proof of his emotional distress claim, Anderson merely referred to his answer to an earlier interrogatory in which he listed numerous illegal acts that Crow allegedly asked him to perform while both were working at EDS.[2]

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[2] "*Interrogatory No. 16*

Describe in detail all facts which support or tend to support your allegation that Crow negligently or intentionally sought to inflict 'emotional distress to Anderson in retaliation of Anderson's refusal to participate in illegal activities at Crow's direction and reporting of Crow's own illegal or irregular activities . . . '

Answer:

See response to Interrogatory No. 5."

Although Anderson's complaint asserts that Crow inflicted the emotional distress *after* Anderson refused to perform the allegedly illegal acts, his interrogatory answer indicates that

To prevail on this claim, Anderson must show that Crow did something extreme or outrageous to him to punish him for his refusal to engage in the illegal acts. Anderson posits that Crow made several unkind statements to him suggesting that Anderson be "a good soldier or no soldier at all," and threatening Anderson with punishment for failing to be loyal to him. *See* Affidavit of George Raymond Anderson, pp. 12-13. Additionally, Anderson claims that Crow sent him a rude and threatening postcard in the mail. Even assuming that Crow did engage in this conduct, the court is unable to say that it was extreme and outrageous.[3] *See Horton v. Montgomery Ward & Co., Inc.*, 827 S.W.2d 361, 369 (Tex. App. – San Antonio 1992, writ denied) ("[i]t is for the court to first determine whether the conduct may reasonably be regarded as so extreme and outrageous as to allow recovery"); *Guzman v. El Paso Natural Gas Company*, 756 F. Supp. 994, 1002 (W.D. Tex. 1990) (same). *Accord, Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372, 1375-77 (5th Cir. 1992) (reversing judgment for plaintiff on intentional infliction of emotional distress claim because employer's

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Crow did nothing more than ask Anderson to engage in illicit conduct. Even if it be assumed (most favorably to Anderson) that the conduct solicited by Crow was in fact illegal, it is nonetheless obvious that Crow's request, which *preceded* Anderson's refusal, could not possibly be *in retaliation for* that refusal.

[3] Liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts §46; *see also Wilson v. Monarch Paper Company*, 939 F.2d 1138, 1143 (5th Cir. 1991). Even conduct which may be illegal in an employment context may not be considered extreme and outrageous. *Wilson*, 939 F.2d at 1143.

conduct not extreme and outrageous); *Johnson v. Merrell Dow Pharmacenticals, [sic] Inc.*, above, 965 F.2d at 33-34 (affirming summary judgment against employee on intentional infliction of emotional distress claim because employer's behavior not extreme and outrageous). Moreover, Anderson has presented no evidence that Crow's conduct has actually caused him to suffer emotional distress, a key element in this cause of action. *K.B. v. N.B.*, 811 S.W.2d 634, 640 (Tex. App. – San Antonio 1991, writ denied), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1963 (1992).

Nor can Anderson prevail on his claim that Crow negligently inflicted emotional distress on him. *See Conaway v. Control Data Corporation*, 955 F.2d 358, 360-61 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 186 (1992) (Texas Supreme Court has not yet recognized a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress).

III. CONCLUSION

The court finds no evidence to support Anderson's claims against Crow for wrongful discharge, tortious interference, or intentional or negligent infliction of emotional distress. Accordingly, Crow's motion for summary judgment is **GRANTED.**

The court finds, however, no violation of Rule 11, F.R. Civ. P. Accordingly, Crow's motion for sanctions under that rule is DENIED.

SO ORDERED.

December 2, 1992.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE RAYMOND (ANDY) ANDERSON, Plaintiff,	)	CIVIL ACTION NO.
VS.	)	CA 3-91-1489-G
ELECTRONIC DATA SYSTEMS CORP., ET AL., Defendants.	)	

ORDER

(Filed Jan. 7, 1992)

Plaintiff's motion to remand is **DENIED.** *See McLean v. Carlson Companies, Inc.*, No. Civ. 3-91-453, 1991 U.S. Dist. LEXIS 17156 (D. Minn. Nov. 25, 1991).

SO ORDERED.

January 7, 1992.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1670

In The
Supreme Court of the United States
October Term, 1993

GEORGE RAYMOND ANDERSON,

Petitioner

v.

ELECTRONIC DATA SYSTEMS CORP.,
DOUGLAS M. CROW,
ANTHONY E. WEYNAND,
RICHARD P. SHLAKMAN,
and DARRELL JOHNSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK SHAW
Counsel of Record

WOODWARD & SHAW,
a Professional Corp.
6688 North Central Expwy.,
Suite 1190
Dallas, TX 75206
(214)373-4090 — Telephone
(214)890-7628 — Facsimile

Counsel for Respondent,
Douglas M. Crow

6 pp

QUESTIONS REVISITED

1. Whether the district court erred in finding that Plaintiff's state law cause of action for wrongful discharge which referred to an employee benefit plan and the Employee Retirement Income Security Act ("ERISA") and which required the existence of an ERISA plan to have an action was preempted by ERISA, either because the action related to an ERISA plan or it conflicted with ERISA's civil enforcement scheme, § 502(a).

2. Whether the district court erred in applying the doctrine of complete preemption to Plaintiff's wrongful discharge claim which fell within the scope of ERISA's civil enforcement scheme, § 502(a).

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TABLE OF AUTHORITIES

Respondent, Douglas M. Crow, adopts by reference the Table of Authorities contained in the Brief In Opposition to Petition for Writ of Certiorari of Respondents Electronic Data Systems Corp., Anthony E. Weynand, Richard P. Shlakman and Darrell Johnson.

STATEMENT OF THE CASE

Respondent, Douglas M. Crow, adopts by reference the Statement of the Case contained in the Brief in Opposition to Petition for Writ of Certiorari of Respondents Electronic Data Systems Corp., Anthony E. Weynand, Richard P. Shlakman and Darrell Johnson.

SUMMARY OF THE ARGUMENT AND ARGUMENT

Respondent, Douglas M. Crow, adopts by reference the summary of the argument, argument and authorities contained in the Brief in Opposition to Petition for Writ of Certiorari of Respondents Electronic Data Systems Corp., Anthony E. Weynand, Richard P. Shlakman and Darrell Johnson.

CONCLUSION

Respondent, Douglas M. Crow, adopts by reference the conclusions contained in the Brief in Opposition to Petition for Writ of Certiorari of Respondents Electronic Data Systems Corp., Anthony E. Weynand, Richard P. Shlakman and Darrell Johnson, and requests that this Court deny all relief requested by George Raymond Anderson, Petitioner, in his Petition for Writ of Certiorari and allow the decision of the Fifth Circuit to stand.

Respectfully submitted,

WOODWARD & SHAW,
A Professional Corp.

Patrick Shaw
6688 North Central Expressway,
Suite 1190
Dallas, TX 75206-3990
Phone (214)373-4090
Fax (214)890-7628

ATTORNEYS FOR
RESPONDENT
DOUGLAS M. CROW

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JUN 24 1994
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(3)

No. 93-1670

In The
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GEORGE RAYMOND ANDERSON,
Petitioner

v.

ELECTRONIC DATA SYSTEMS CORP.,
DOUGLAS M. CROW,
ANTHONY E. WEYNAND,
RICHARD P. SHLAKMAN,
and DARRELL JOHNSON,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILLIP N. SMITH JR.
Counsel of Record

JEFFREY A. CARTER
MICHAEL ANDREW PIAZZA
McKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
214-978-4000

Counsel for Respondents,
Electronic Data Systems Corporation,
Anthony E. Weynand, Richard P.
Shlakman, and Darrell Johnson

103 pp

QUESTIONS PRESENTED

1. Whether the district court erred in finding that Plaintiff's state law cause of action for wrongful discharge, which referred to an employee benefit plan and the Employee Retirement Income Security Act ("ERISA"), which contained allegations that he was asked to violate ERISA, and which required the existence of an ERISA plan to pursue the action, was preempted by ERISA, either because the action related to an ERISA plan or it conflicted with ERISA's civil enforcement scheme, § 502(a).

2. Whether the district court erred in applying the doctrine of complete preemption to Plaintiff's wrongful discharge claim which fell within the scope of ERISA's civil enforcement scheme, § 502(a).

RULE 29.1 LIST OF PARENTS AND SUBSIDIARIES

The parent company of respondent Electronic Data Systems Corporation is General Motors Corporation. The North American subsidiaries (other than wholly owned subsidiaries) in which Electronic Data Systems Corporation holds at least a five percent equity interest are Aristacom International, Inc., The ASK Group, Inc., Behaviortech, Inc., CAPSCO Software Canada Ltd., CLS Corporation, Comtrac Corporation, Convergent Corporation, Hitachi Data Systems Holding Corporation, Neodata Corporation, One Touch Systems, Inc., Soft-Switch, Inc., Spectrum Investment Systems Inc., Systems Control Technology Inc., Telecommunications Data Services, Incorporated, and Thomas Group, Inc. International subsidiaries (other than wholly owned subsidiaries) in which Electronic Data Systems Corporation holds at least a five percent equity interest are Klockner Datem Technik GmbH, Aeronautical Systems Designers Limited, COGSYS Limited, BSS Belgique, GMB Belgique, Informatique Proget (Brussels), CLIOR, E.A.I. (Europe Assurance Informatique), F.I.J. (France Informatique Juridique), GEST'HELP HUISSIER, Infosys, OGIP ORGA, PROGICAL, SLIB, SONIA, TELEMAC, BSS Grece, and EDS Hellas.

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Case.

Petitioner George Raymond Anderson ("Anderson") filed suit on June 26, 1991 in Texas state court against Respondents Electronic Data Systems Corporation ("EDS"), a Texas corporation, and four present or former EDS employees, Douglas M. Crow ("Crow"), Anthony E. Weynand ("Weynand"), Richard P. Shlakman ("Shlakman"), and Darrell Johnson ("Johnson"), all Texas residents.[1] Anderson alleged that he too was a Texas resident.[2]

On July 25, 1991, the Respondents joined in removing the case to the United States District Court for the Northern District of Texas, Dallas Division.[3] Over four months later, on December 5, 1991, Anderson moved to remand the case back to state court.[4] The district court denied Anderson's motion.[5]

Crow obtained a summary judgment in December 1992.[6] In April 1993, Anderson filed a second amended complaint in which he voluntarily dismissed the remaining individual defendants, Weynand, Shlakman, and Johnson, leaving EDS as the sole

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[1] Plaintiff's Original Petition ¶ 1 dated June 26, 1991 (hereinafter "Original Petition") (R. 92-104; A. 1-2). The unsealed portions of the record are cited in this Brief in Opposition by referring to the page number of the record as follows: "R. page no." The sealed portions of the record are identified by asterisks on the docket sheet and are cited in this Brief as "R. Sealed." Materials in the Appendix are cited as "A, B, C, D, or E page no." as appropriate. Appendix E is being filed separately under seal.

[2] *Id.*

[3] Notice of Removal (R. 1-5).

[4] Motion to Remand (R. 299-300; B. 1).

[5] Order dated January 7, 1992 (R. 331).

[6] Memorandum Order dated December 2, 1992 (R. 631).

remaining defendant and dismissed all claims against EDS except for a claim for wrongful discharge under Texas common law.[7] The district court granted EDS' motion for summary judgment in June 1993.[8] Anderson appealed to the United States Court of Appeals for the Fifth Circuit to challenge the district court's denial of his motion to remand. He did not, however, raise any issue on appeal with respect to the district court's summary judgment rulings.[9]

B. Statement Of Facts.

Anderson joined EDS in October 1984.[10] According to Anderson, he became the "Manager of Investments and Debts" in EDS' Domestic Treasury Department in 1985, and as such, he was responsible for all domestic investments made on behalf of

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[7] Second Amended Complaint (R. 672-679). In his motion for leave to file the Second Amended Complaint, Anderson expressly asked for leave to dismiss his claims against each of the individual defendants. Motion for Leave to File Plaintiff's Second Amended Complaint p. 2, dated March 5, 1993 (R. 647).

Weynand, Shlakman, and Johnson moved to dismiss Anderson's appeal against them. The Fifth Circuit did not rule on their motion. By joining in this Brief in Opposition, Weynand, Shlakman, and Johnson do not intend to waive or forego, and want to preserve, any rights they may have to the dismissal of Anderson's appeal against them.

[8] Judgment dated June 4, 1993 (R. 709); Memorandum Order dated June 4, 1993 (R. 701).

[9] Brief-in-Chief of the Appellant, George Raymond Anderson, *Anderson v. EDS*, No. 93-1606 (5th Cir.) (hereinafter "Appellant's Brief").

[10] Original Petition ¶ V (R. 94-95; A. 4); Second Amended Complaint ¶ 5 (R. 673).

the investment portfolios of EDS, including EDS' pension funds.[11] EDS terminated Anderson in August 1989.[12]

In his Original Petition, Anderson contended that he was terminated because (i) he refused to do illegal acts requested by Crow, his supervisor, (ii) he reported Crow's illegal acts to EDS management, and (iii) his accusations about Crow embarrassed management.[13] Anderson listed four allegedly illegal acts that he contended Crow asked him to do, two of which Anderson claimed would have violated ERISA.[14] Anderson further alleged that when he refused to do the acts requested by Crow, Crow either did them himself or forced someone else to do them; Crow threatened him after he refused to do the acts; and Crow and Weynand "actively sought occasion to discriminate against and ultimately terminate him because he refused to commit the illegal acts and because of his accusations against Crow."[15]

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[11] Original Petition ¶ IV (R. 94-95; A. 3-4); Second Amended Complaint ¶ 5 (R. 673).

[12] Original Petition ¶ XIII (R. 100; A. 9).

[13] *Id.*

[14] According to Anderson, he was asked to:

> sign on two separate occasions approval of payment invoices on behalf of the pension portfolios under [Anderson's] management and supervision who (sic) had been retained by Crow without approval of the pension trustees. Such action would have been a violation of the Federal Employee Retirement Income Security of 1974 ("Erisa") Laws governing management of such pension funds.
>
> * * *
>
> write up minutes for meetings which [Anderson] did not attend in connection with the EDS Retirement Plan. This also in violation of ERISA (sic).

Original Petition ¶ VII (R. 96-97; A. 4-5).

[15] Original Petition ¶¶ VIII (R. 97; A. 6) and XI (R. 99; A. 8).

In his Motion to Remand, Anderson contended that (i) certain of the illegal activities Crow asked him to do would have violated ERISA, (ii) his refusal as a plan administrator to violate ERISA was "a reason in whole or in part for his termination," and (iii) his refusal to violate ERISA comprised a part of his claim for wrongful discharge.[16]

Anderson also admitted in his Motion to Remand that the district court had supplemental jurisdiction under 28 U.S.C. § 1367.[17] He urged the court, however, to decline to exercise its supplemental jurisdiction "since all bases for federal jurisdiction have been eliminated by pleading amendment."[18]

In April 1993, EDS took Anderson's deposition. Anderson testified that he was living and working in Oklahoma City, Oklahoma.[19] He further testified that he took the job in Oklahoma City approximately nine months after he was terminated in August 1989, which would have been about May or June 1990.[20] Anderson sued EDS in June 1991.

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[16] Motion to Remand p. 2 (R. 300; B. 2). In answers to interrogatories, Anderson maintained that Crow also violated ERISA by asking him to sign the invoices and prepare the minutes. Plaintiff's Responses to Douglas M. Crow's Interrogatories (August 1, 1991), Answer to Interrogatory 11 (Volume 4 of the Record, R. 58-60). *See* Brief of Appellees p. 8, n. 20 (D. 15).

[17] 28 U.S.C. § 1367(a) provides in pertinent part that: in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. (C. 1).

[18] Motion to Remand p. 4 (R. 302; B. 3).

[19] Anderson Deposition at pp. 7-8 (R Sealed; E. 6-7).

[20] *Id.* at p. 6 (E. 6).

SUMMARY OF THE ARGUMENT

The circumstances of this case do not warrant the Court's exercise of its certiorari power. Anderson has made no showing of conflict between the Fifth Circuit's decision in this case and the decisions of other federal or state courts. He argues only that the Fifth Circuit failed to follow the decisions of this Court. The law applicable to the issues raised by Anderson is well settled and was correctly applied by the Fifth Circuit.

This Court's decision in *Ingersoll-Rand Co. v. McClendon,*[21] makes clear that Anderson's action "relates to" an ERISA plan. His action referred to ERISA, was based on the existence of an ERISA plan, and required the district court to inquire into whether the actions alleged by Anderson would have violated ERISA or an employee benefit plan covered by ERISA. Moreover, Anderson's action conflicts with the civil enforcement scheme of ERISA.

Likewise, this Court's decisions in *Metropolitan Life Ins. Co. v. Taylor*[22] and *McClendon* teach that ERISA completely preempts actions, like Anderson's, that are within the civil enforcement scheme of ERISA. Anderson's claim that he was demoted, discriminated against, and terminated because he refused to violate his fiduciary duties under ERISA and because he reported the violations or attempted violations to EDS management falls within the scope of § 502(a) of ERISA, resulting in the district court having jurisdiction over his claim.

The arguments Anderson raises in his Petition for Certiorari have been rejected by this Court. As this Court ruled in *McClendon,* ERISA is not merely collateral or incidental to a state common law cause of action, but in fact relates to that action, if that action refers to ERISA or an ERISA plan is necessary to

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[21] 498 U.S. 133, 111 S.Ct. 478 (1990).

[22] 481 U.S. 58, 107 S.Ct. 1542 (1987).

pursue the action. In addition, this Court ruled in *McClendon* and *Taylor* that ERISA completely preempts state common law causes of action within the scope of § 502(a) even when ERISA does not provide the same remedies available at common law, ERISA does not provide a cause of action identical to the state claim, or the plaintiff is not seeking any of the relief provided by ERISA.

In addition to the grounds cited by the Fifth Circuit, EDS respectfully contends that the district court's finding of subject matter jurisdiction could also be upheld based on the well-pleaded complaint rule.[23] Resolution of Anderson's wrongful discharge claim under Texas law required Anderson to plead and the district court to determine whether an ERISA plan existed, whether Anderson was asked to commit acts which would have violated that plan, and whether Anderson was fired solely for refusing to commit those acts, satisfying the well-pleaded complaint rule.

EDS further respectfully contends that given Anderson's failure to move for remand in a timely manner, under *Grubbs v. GECC,*[24] the proper test on appeal was whether the district court could have had original jurisdiction of the case at the time it entered summary judgment for EDS. [25] Applying the *Grubbs* test, the district court had original jurisdiction at that time based on the complete diversity of the parties.

Finally, EDS notes Anderson admitted in his Motion to Remand that the district court had supplemental jurisdiction

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[23] Brief of Appellees pp. 16-18 (D. 22-25).

[24] 405 U.S. 699, 92 S.Ct. 1344 (1972).

[25] Brief of Appellees pp. 39-45 (D. 44-49).

under 28 U.S.C. § 1367.[26] Anderson's appeal and Petition for a Writ of Certiorari are inconsistent with that admission.

EDS respectfully urges the Court to deny Anderson's Petition for a Writ of Certiorari.

ARGUMENT

I. THE FIFTH CIRCUIT FOLLOWED THE DECISIONS OF THIS COURT AND DID NOT ERR IN UPHOLDING THE DISTRICT COURT'S REFUSAL TO REMAND THE CASE.

The Fifth Circuit did not err in finding that Anderson's wrongful discharge cause of action (i) was preempted because it related to an ERISA plan and conflicted with ERISA's civil enforcement scheme and (ii) stated a federal cause of action under the complete preemption doctrine because it fell within the scope of ERISA's civil enforcement scheme. This Court has addressed the issues raised by Anderson in several decisions, including decisions in *Ingersoll-Rand Co. v. McClendon* and *Metropolitan Life Ins. Co. v. Taylor*. The Fifth Circuit correctly applied and followed those decisions in upholding the district court's denial of remand.

A. Anderson's Wrongful Discharge Cause Of Action Was Preempted Because It Relates To An ERISA Plan.

This Court has confirmed on numerous occasions the broad reach of ERISA's preemption provision, § 514(a).[27] ERISA

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[26] Motion to Remand p. 4 (R. 302; B. 3); Brief of Appellees p. 11, n. 32 (D. 17).

[27] *See, e.g., District of Columbia v. Greater Washington Board of Trade*, ___ U.S. ___, ___, 113 S.Ct. 580, 583 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 137, 111 S.Ct. at 482; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552 (1987).

displaces any state law that relates to an employee benefit plan covered by ERISA, including state common law causes of action.[28] This Court noted that a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan,"[29] even if "the law is not specifically designed to affect such [a] plan[], or the effect is only indirect."[30]

In *McClendon*, this Court applied these ERISA preemption principles to find McClendon's Texas common law claim that his employer wrongfully discharged him to avoid paying pension benefits was preempted by ERISA.[31] McClendon's cause of action related to an ERISA plan because the existence of a pension plan was a critical factor in establishing liability: (i) McClendon's action made specific reference to the existence of a pension plan; (ii) to prevail, McClendon had to plead and prove the existence of a pension plan; and (iii) the court had to direct its inquiry to the plan to rule on the claim.[32]

Following *McClendon*, the Fifth Circuit correctly held that Anderson's wrongful discharge claim also related to an ERISA plan since it too required the existence of an ERISA plan to

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[28] § 514(a) and (c)(1), 29 U.S.C. § 1144(a) and (c)(1).

[29] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139, 111 S. Ct. at 483, *quoting*, *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900 (1983).

[30] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139, 111 S.Ct. at 483. *See, e.g.*, *District of Columbia v. Greater Washington Board of Trade*, ___ U.S. at ___, 113 S.Ct. at 583 (1992); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 47-48, 107 S.Ct. at 1553.

[31] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139-41, 111 S.Ct. at 483-84.

[32] *Id.* at 140, 111 S.Ct. at 483.

establish liability.[33] As the Fifth Circuit noted, Anderson claimed that he was wrongfully terminated because he refused to violate ERISA and reported the requested violations to management.[34] Under Texas common law, a discharged employee has a cause of action if he can show he was terminated solely because he refused to do an illegal act.[35] Thus, as in *McClendon*, the existence of a pension plan was critical to establishing liability on Anderson's cause of action. Anderson's claim made specific reference to an ERISA plan; Anderson had to plead and prove the existence of a pension plan; and the court had to direct its inquiry to the plan to rule on the claim. In addition, ERISA was critical to Anderson's claim because to establish the claim Anderson also had to prove the acts he refused to commit would have violated the plan or ERISA.[36]

B. Anderson's Wrongful Discharge Claim Was Preempted Because It Conflicted With ERISA's Civil Enforcement Scheme.

This Court has also consistently recognized the comprehensive nature of ERISA's civil enforcement scheme embodied in § 502(a),[37] and Congress' intent that the enforcement scheme

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[33] *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994).

[34] *Id.*

[35] *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

[36] *Id.* ("it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.").

[37] 29 U.S.C. § 1132(a). Section 502(a) provides in part that any participant, beneficiary, or fiduciary may bring a civil action:

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other

serve as the exclusive remedy for ERISA related violations.[38] This Court found that McClendon sought a remedy under Texas common law for the violation of a right expressly guaranteed by § 510[39] and exclusively enforced by § 502(a) of ERISA, and held that McClendon's state law claim was preempted because of this conflict.[40]

Relying on *McClendon*, the Fifth Circuit found that Anderson's claim "conflict[ed] with the detailed and carefully balanced remedy provisions of ERISA."[41] The Fifth Circuit explained that "§ 502(a) provides remedies for participants, beneficiaries, and fiduciaries of ERISA plans" and that based on Anderson's allegations, he was both a participant and a fiduciary.[42] The court further explained that Anderson's claim of discharge for refusing to commit certain acts as a fiduciary and for reporting those requested violations, fell squarely within the ambit of § 510 which makes it unlawful to discharge or discriminate against any person "for exercising ERISA rights or for the purpose of interfering

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appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter of the terms of the plan.

[38] *See, e.g., Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 144, 111 S.Ct. at 485; *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. at 54, 107 S.Ct. at 1566.

[39] 29 U.S.C. § 1140.

[40] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 145, 111 S.Ct. at 486.

[41] *Anderson v. EDS,* 11 F.3d at 1314.

[42] *Id. See* 29 U.S.C. § 1002(7),(8), and (21) (C. 1-2). Section 502(a) is the exclusive enforcement scheme for all matters within subchapter one of ERISA which includes all of the administrative and enforcement provisions regarding ERISA plans, including, *inter alia,* provisions pertaining to disclosure, reporting, preparation of plan descriptions, filing and furnishing information, fiduciary duties and liability, and coercion and interference with protected rights. 29 U.S.C. §§ 1001-1145.

with the attainment of ERISA rights, as well as for discharges for providing information or testimony relating to ERISA."[43]

C. Anderson's Wrongful Discharge Cause Of Action Was Completely Preempted By ERISA Because It Was Within The Scope Of ERISA's Civil Enforcement Scheme.

Although federal preemption is ordinarily a defense and does not support removal of a case to federal court, this Court has recognized that Congress can so completely preempt an area of the law that any state law cause of action within the area preempted is treated as federal in character and is removable.[44] In *Taylor,* this Court determined that the "complete preemption doctrine" first applied to claims preempted by § 301 of the Labor Management Relations Act[45] ("LMRA"), also applies to claims within the scope of the civil enforcement provisions of § 502(a) of ERISA.[46] Furthermore, in *McClendon*, this Court recognized that under the complete preemption doctrine announced in *Taylor*, "an ERISA preemption defense provides a sufficient basis for removal of a cause of action" to federal court.[47]

Applying *Taylor*, the Fifth Circuit correctly held that Anderson's claim of demotion and termination for refusing to violate ERISA and reporting such violations fell within the scope of § 502(a) and was, therefore, removable.[48] Anderson, a participant

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[43] *Anderson v. EDS,* 11 F.3d at 1314.

[44] *See, e.g., Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64, 107 S.Ct. 1542, 1546 (1987).

[45] 61 Stat. 156, 29 U.S.C. § 185.

[46] *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 66-67, 107 S.Ct. at 1547-48.

[47] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 145; 111 S.Ct. at 486.

[48] *Anderson v. EDS,* 11 F.3d at 1315.

and fiduciary, alleged he was asked to violate ERISA provisions which are enforced under § 502(a), that his supervisor committed the violations when he refused, and that he was threatened, demoted, discriminated against, and eventually terminated because of his refusal to violate ERISA. These allegations bring Anderson's claim within the scope of § 502(a).

II. IT IS ANDERSON WHO IS NOT FOLLOWING THE DECISIONS OF THIS COURT.

In support of his Petition, Anderson argues that the district court erred in refusing to remand the case because (i) ERISA is collateral to his claim and, therefore, his claim is not related to an ERISA plan, (ii) ERISA does not provide a remedy for his claim, and (iii) his claim does not fall within the scope of § 502(a) because ERISA does not provide an action identical to his wrongful discharge claim and he is not seeking any of the relief provided by ERISA. Anderson's arguments ignore and are contrary to the teachings of this Court in *McClendon* and *Taylor*.

A. State Law Claims Are Subject To Preemption And Removal Under ERISA.

Anderson argues that his wrongful discharge claim does not relate to ERISA because it is based solely on state law. According to Anderson, ERISA is collateral to his claim because it merely identifies the type of law he refused to violate.[49] This Court expressly and implicitly has rejected both arguments.

The facts of both *Taylor* and *McClendon* establish that state law causes of action are subject to preemption and removal under ERISA. Taylor asserted only state law claims for breach of contract, to reimplement employment benefits and insurance coverage, for wrongful termination, and for wrongful failure to

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[49] Petition for a Writ of Certiorari pp. 11-12.

promote.[50] McClendon asserted a wrongful discharge claim under Texas common law.[51] This Court in each case recognized the application of the complete preemption doctrine to the state law claims.[52]

In addition, as does Anderson, McClendon argued that the pension plan was not relevant to his wrongful discharge action. According to McClendon, the only issue was whether his employer's motive for firing him was improper. This Court rejected that argument because it missed the point "that under the Texas court's analysis there [was] simply no cause of action if there [was] no plan."[53] Similarly, as the Fifth Circuit recognized, Anderson can not establish his claim that he was fired because he refused to violate an ERISA plan without establishing the existence of a plan and that the requested act would have violated either the plan or ERISA.[54]

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[50] *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 61, 107 S.Ct. at 1545.

[51] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 136, 111 S.Ct. at 481.

[52] *Id.* at 145, 111 S.Ct. at 486; *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 67, 107 S.Ct. at 1548.

[53] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 140, 111 S.Ct. at 483-84.

[54] *Anderson v. EDS,* 11 F.3d at 1314.

Anderson cited *Willy v. Coastal Corp.,* 855 F.2d 1160 (5th Cir. 1988) in support of his position that ERISA was merely collateral. Petition for a Writ of Certiorari pp. 9-11. The Fifth Circuit's finding that Willy's claim of wrongful discharge for refusing to violate state and federal environmental laws was not federal in nature is distinguishable from the facts of this case and was not relied upon by the Fifth Circuit below.

One, unlike Willy, who did not have a private cause of action under federal environmental laws, Anderson could have had a private action under ERISA. He could have brought an action to enjoin any of Crow's

B. A State Law Claim Is Removable Even If ERISA Does Not Provide A Remedy For The Claim.

Anderson further argues that removal of a state law claim is impermissible unless ERISA provides a remedy for that claim.[55] This Court rejected that argument in *Taylor*, *McClendon*, and other ERISA decisions.

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acts that allegedly violated ERISA or an action against Crow and others for allegedly threatening, demoting, or terminating him for complying with ERISA and providing information to management regarding the alleged violations. *See* §§ 404(a)(1), 405(a), 409(a), and 502(a) of ERISA, 29 U.S.C. §§ 1104(a)(1), 1105(a), 1109(a), 1132(a) (C. 1-3); Original Petition ¶ IV & VIII (R. 94-95, 97, A. 3-4, 6).

Two, as the *Willy* court recognized, a distinction exists between the areas of environmental law, where the states and federal government have been "traditional partners," and employee benefit plan law, where Congress through ERISA took from the states any shared responsibility for the regulation of covered plans. *Willy v. Coastal Corp.*, 855 F.2d at 1166 and 1167, n. 10. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 1906 (1981). Three, after *Willy*, this Court determined in *McClendon* that ERISA is related to, and not merely "collateral," to a wrongful discharge claim that involves or is based on an alleged violation of ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 140, 111 S.Ct. at 483.

Anderson also cited two district court decisions from the Fifth Circuit. *Sperling v. Texas Health Enterprises, Inc.*, 791 F. Supp. 662 (S.D. Tex. 1992) and *Nowoc v. Rheem Mfr. Co.*, 772 F. Supp. 977 (S.D. Tex. 1991). Each is distinguishable. Unlike McClendon (and Anderson), Sperling was not a plan participant or beneficiary; Sperling did not allege a violation of ERISA or of an ERISA plan as did McClendon (and Anderson); and unlike McClendon (and Anderson), Sperling had a cause of action even if an ERISA plan did not exist. *Sperling v. Texas Health Enterprises, Inc.*, 791 F. Supp. at 664-65. Unlike McClendon (and Anderson), Nowoc did not allege a violation of ERISA or that an ERISA violation was involved in any way with his termination. *Nowoc v. Rheem Mfr. Co.*, 772 F. Supp. at 979. *See* Brief of Appellees pp. 21-25 and accompaning notes, (D. 26-30).

[55] Petition for a Writ of Certiorari p. 15.

In modeling § 502(a) after § 301, "Congress was well aware that the powerful preemptive force of § 301 of the LMRA displaced all state law claims, even when the state action purported to authorize a remedy unavailable under the federal provision."[56] The careful crafting of ERISA's enforcement scheme is "strong evidence that Congress did *not* intend to authorize other remedies it simply forgot to incorporate expressly."[57] As this Court recognized, the policy choices reflected in the inclusion of certain remedies and the exclusion of others from ERISA's comprehensive enforcement scheme would be completely undermined if participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.[58]

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[56] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 144, 111 S.Ct. at 485-86. *See also Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 812 (1992) and *Hansen v. Continental Ins. Co.,* 940 F.2d 971 (5th Cir. 1991) discussed in Brief of Appellees pp. 37-39 (D. 42-44).

[57] *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. at 54, 107 S.Ct. at 1556, *quoting, Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S.Ct. 3085, 3092 (1985).

[58] *Id.* at 144, 111 S.Ct. at 485; *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 64-65; 107 S.Ct. at 1547; *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. at 54, 107 S.Ct. at 1556.

Congress sought "to ensure that plan and plan sponsors would be subject to a uniform body of law; the goal was to minimize the administrative and financial burdens of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 142, 111 S.Ct. at 484. Allowing state common law actions such as McClendon's, and Anderson's here, to proceed "would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a)." *Id.*

> It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

C. Complete Preemption May Occur Even If ERISA Does Not Provide An Action Identical to the Action Being Preempted Or The Plaintiff Is Not Seeking Any Relief Under ERISA.

Anderson further argues that his cause of action is not within the scope of § 502(a) of ERISA because ERISA does not provide a specific cause of action for someone terminated for refusing to violate ERISA. In addition, Anderson argues that his claim is not within the scope of § 502(a) because he is not seeking any of the relief provided in the section.[59] Anderson, however, misconstrues the test announced in *Taylor,* and followed in *McClendon,* for applying the complete preemption doctrine.

As the *Taylor* decision teaches, the test for complete preemption is not whether ERISA provides a cause of action identical to the state law action being preempted, but whether that state law action is "within the scope of the civil enforcement provisions of § 502(a)."[60] The *Taylor* test is consistent with Congress' desire for uniformity and the recognition of the policy choices that went into formulating the exclusive federal remedy.

Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement. *Id.*

This court left standing a decision in the Sixth Circuit that ERISA preempted a claim of wrongful discharge for fulfilling ERISA duties. *See Authier v. Ginsberg*, 757 F.2d 796, 802 (6th Cir.), *cert. denied*, 474 U.S. 888, 106 S.Ct. 208 (1985) ("allowing the remedies available to an ERISA fiduciary discharged for complying with ERISA to turn upon the state of his employment and a state court's interpretation of ERISA's provisions runs contrary to Congress' desire to establish a uniform federal law regulating pension laws").

[59] Petition for a Writ of Certiorari pp. 16-19.

[60] *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 66-67, 107 S.Ct. at 1548. This Court found that Taylor's state law claims, including a claim for wrongful termination, were all properly removed even though ERISA did not provide a cause of action identical to any of his state law claims.

This Court has applied the test to find state law actions without counterparts in ERISA preempted.[61]

In *McClendon*, this Court also rejected Anderson's argument that he is not seeking any of the specific relief provided by § 502(a). This Court found that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits' . . . . Consequently, it is no answer to a preemption argument that a particular plaintiff is not seeking recovery of pension benefits." [62]

III. ADDITIONAL GROUNDS EXIST TO SUPPORT THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DISTRICT COURT'S REFUSAL TO REMAND.

Additional grounds exist for finding that the district court had jurisdiction to enter summary judgment in favor of EDS.[63] One, under the well-pleaded complaint rule, Anderson's claim was federal in nature which gave the district court removal jurisdiction.[64] Two, the district court had original subject matter jurisdiction at the time it entered the summary judgment in favor

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[61] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 136 and 145, 111 S.Ct. at 481 and 486; *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 66-67, 107 S.Ct. at 1548; *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 43 and 56, 107 S.Ct. 1551 and 1558.

[62] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. at 145, 111 S.Ct. at 486.

[63] "[A] prevailing party may . . . defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals . . . . " *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38, 109 S.Ct. 2782, 2788 (1989), *quoting, Washington v. Yakima Indian Nation,* 439 U.S. 463, 476, n. 20, 99 S.Ct. 740, 749, n. 20 (1979). *See, e.g., Whitley v. Albers,* 475 U.S. 312, 326, 106 S.Ct. 1078, 1087 (1986).

[64] Brief of Appellees pp. 16-18 (D. 22-24).

of EDS.[65] Three, Anderson admitted in his Motion to Remand that the district court had supplemental jurisdiction.[66]

A. The District Court Had Removal Jurisdiction Under The Well-Pleaded Complaint Rule.

In determining whether a civil action arises under federal law, courts apply the "well-pleaded complaint" rule. The rule provides that a cause of action arises under federal law only when, at the time of removal, the plaintiff's well-pleaded complaint raises issues of federal law or discloses a federal controversy.[67] When "the vindication of a right under state law necessarily turns upon some construction of federal law,"[68] or when the action requires the resolution of a substantial question of federal law, that action arises under federal law.[69]

Anderson's Original Petition, the pleading upon which removal was based, raised issues of federal law that had to be resolved to rule on his claim.[70] To succeed on his wrongful

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[65] *Id.* at pp. 39-45 (D. 44-49).

[66] *Id.* at p. 11, n. 32 (D. 17).

[67] *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63, 107 S.Ct. at 1546; *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13, 57 S.Ct. 96, 97-98 (1936).

[68] *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 542 (5th Cir. 1990).

[69] *Franchise Tax Board of CA. v. Construction Laborers Vacation Trust for Southern CA.*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856 (1983).

[70] Anderson argues that the well-pleaded complaint rule is not applicable because, as the Fifth Circuit noted, his Original Petition did not contain a federal cause of action. Petition for a Writ of Certiorari pp. 9 & 22. Contrary to Anderson's assertion, this is the exact situation in which the rule is applied. The rule is used to determine whether the state action requires resolution of a federal question. *Franchise Tax Board of CA. v. Construction Laborers Vacation Trust for Southern CA.*,

discharge claim, Anderson had to show that he was asked to commit an act in violation of ERISA and was fired solely because he refused to do so. To rule on Anderson's claim, a court would have had to determine whether an ERISA plan existed and whether the acts allegedly requested of Anderson would have violated the plan or ERISA.

B. The District Court Had Original Jurisdiction At The Time It Entered Judgment For EDS.

Based on Anderson's delay in seeking to remand the case, the district court had original jurisdiction to enter summary judgment in favor of EDS in June 1993. This Court held in *Grubbs v. GECC* that an alternative standard governs the determination of subject matter jurisdiction when (i) a case is improperly removed to federal court, (ii) the federal court nonetheless tries the case on the merits and enters judgment, and (iii) no objection is raised regarding removal until after judgment is entered.[71] Under *Grubbs,* the judgment is upheld if the district court would have had original jurisdiction over the case based on the record and the pleadings as they existed at the time of the judgment.[72]

Assuming for the sake of argument that Anderson is correct that EDS improvidently removed this case, the first factor in *Grubbs* is satisfied. Similarly, the second factor is satisfied by the entry of the summary judgment in favor of EDS.[73] The third factor is satisfied by Anderson's failure to file a timely motion to

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463 U.S. at 13, 103 S.Ct. at 2848 (Even though state law creates plaintiff's cause of action, his case might still "arise under" federal law, as determined under the well-pleaded complaint rule).

[71] 405 U.S. 699, 702, 92 S.Ct. 1344, 1347 (1972).

[72] *Id. See also American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 16, 71 S.Ct. 534, 541 (1951); *Mackay v. Uinta Development Company,* 229 U.S. 173, 33 S.Ct. 638, 639 (1913).

[73] *Kidd v. Southwest Airlines,* 891 F.2d 540, 546 (5th Cir. 1990).

remand.[74] Anderson waived any defect in the removal except for lack of subject matter jurisdiction by not moving to remand the case within 30 days of its removal.[75]

The record at the time of entry of the judgment established that diversity of citizenship existed between Anderson, an Oklahoma resident, and EDS, a Texas resident.[76] Initially, and at the time of the summary judgment, the case could have been

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[74] 28 U.S.C. § 1447(c) (30 day period to move for remand) (C. 1).

[75] If a federal district court has original jurisdiction of an action improperly removed and the plaintiff fails to file a timely motion to remand, then the district court may retain jurisdiction of the action even if it lacked removal jurisdiction. *See, e.g., Williams v. AC Spark Plugs Div. of General Motors Corp.*, 985 F.2d 783, 787 (5th Cir. 1993); *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir. 1992); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 430 (1991).

The basis for the court's original jurisdiction does not have to have been asserted as a basis for removal, *Baris v. Sulpicio Lines, Inc.*, 932 F.2d at 1545-46, and often could not have served as a basis for removal, *In re Shell Oil Co.*, 932 F.2d 1518, 1519 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 914 (1992) (the diversity of the parties' residence supported original jurisdiction but not removal jurisdiction).

[76] Anderson alleged in his Original Petition that he was a Texas resident. When EDS took Anderson's deposition in April 1993, it learned for the first time that Anderson was not a Texas resident when he filed suit. Anderson testified that he moved to Oklahoma City, Oklahoma and got a job there within nine or ten months of being terminated by EDS in August 1989, which would have been sometime in May or June 1990. Anderson filed suit in June 1991. Anderson further testified at his deposition that he had held that same job through the date of the deposition. Anderson Deposition pp. 6-8, 28 (E. 6-9).

This Court in *Grubbs* relied on record excerpts from discovery proceedings to establish the original jurisdiction of the district court. *Grubbs v. GECC*, 405 U.S. at 704, 92 S.Ct. at 1348.

brought in a federal district court sitting in Dallas, Texas.[77] Original jurisdiction based on diversity of citizenship existed from the beginning of the suit through the entry of summary judgment in favor of EDS.

C. Anderson Admitted That The District Court Had Supplemental Jurisdiction.

In his Motion to Remand, Anderson admitted that the district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367.[78] He urged the court, however, to exercise its discretion and not keep the case based on that jurisdiction.[79] Anderson did not argue on appeal and does not argue now that the district court abused its discretion under § 1367 in retaining the case. Anderson's appeal and Petition for Certiorari are inconsistent with his admission that the district court had supplemental jurisdiction.

CONCLUSION

Anderson is asking this Court to allow him to pursue his claim in the face of the clear intent of Congress, as recognized by this Court, to provide a uniform body of law applicable to ERISA plans and plan administration, to establish a comprehensive enforcement scheme within ERISA to address violations, and to preempt all state actions that fall within the scope of that scheme. To allow Anderson to proceed in state court, this Court would have to ignore the well established body of law addressing ERISA preemption.

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[77] *See, e.g., In re Shell Oil Co.*, 932 F.2d at 1519 (upheld district court decision not to remand because plaintiff failed to move for remand within 30 days and district court had original jurisdiction based on diversity of citizenship, even though the diversity would not have supported removal jurisdiction).

[78] Motion to Remand p. 4 (R. 302; B. 3)(C. 1).

[79] *Id.*

The Fifth Circuit correctly followed the decisions of this Court, including *McClendon* and *Taylor*, in finding that the district court had jurisdiction to enter summary judgment in favor of EDS. At the time it entered judgment for EDS, the district court had removal jurisdiction under the complete preemption doctrine as found by the Fifth Circuit. The district court also had removal jurisdiction under the well-pleaded complaint rule and original subject matter jurisdiction based on diversity of citizenship. In addition, Anderson recognized at the time he sought to remand the case that the district court had supplemental jurisdiction.

EDS requests that this Court deny Anderson's Petition for Certiorari and allow the decision of the Fifth Circuit to stand.

Respectfully submitted,

Phillip N. Smith Jr.
Counsel of Record

Jeffrey A. Carter
Michael Andrew Piazza
McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
214-978-4000

Counsel for Respondents,
Electronic Data Systems
Corporation, Anthony E. Weynand,
Richard P. Shlakman, and
Darrell Johnson

NO. 91-7509

GEORGE RAYMOND (ANDY) ANDERSON	)	IN THE DISTRICT COURT OF
VS.	)	DALLAS COUNTY, TEXAS
ELECTRONIC DATA SYSTEMS CORP., DOUGLAS M. CROW, ANTHONY E. WEYNAND, AND RICHARD P. SHLAKMAN, DARRELL JOHNSON	)	JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, GEORGE RAYMOND (ANDY) ANDERSON ("Anderson") Plaintiff in above-styled and numbered cause, and files this his Plaintiff's Original Petition, complaining of Electronic Data Systems Corporation ("EDS"), Douglas M. Crow ("Crow"), Anthony E. Weynand ("Weynand"), Richard P. Shlakman ("Shlakman") and Darrell Johnson ("Johnson") Defendants, and for cause of action would show the Court the following:

I.

Plaintiff is a resident of the State of Texas, and was at the time of the incident.

Defendant EDS is a Texas corporation whose principal place of business is located in Dallas County, Texas. Service of process on EDS may be accomplished by serving its attorney, Phillip N. Smith, BAKER & BOTTS, 2001 Ross Avenue, Suite 800, Dallas, Texas 75201, who has indicated he will accept service on behalf of such Defendant.

Defendant Crow is a resident of Dallas County, Texas. Service of process may be accomplished by serving his attorney, Patrick Shaw, WOODWARD & SHAW, 6688 North Central Expressway, Suite 1190, Dallas, Texas 75206, who has indicated he will accept service on behalf of such Defendant.

Defendant Weynand is a resident of Dallas County, Texas. Service of process on Defendant Weynand may be accomplished by serving his attorney, Phillip N. Smith, BAKER & BOTTS, 2001 Ross Avenue, Suite 800, Dallas, Texas 75201, who has indicated he will accept service on behalf of such Defendant.

Defendant Shlakman is a resident of Dallas County, Texas. Service of process on Defendant Shlakman may be accomplished by serving his attorney, Phillip N. Smith, BAKER & BOTTS, 2001 Ross Avenue, Suite 800, Dallas, Texas 75201, who has indicated he will accept service on behalf of such Defendant.

Defendant Johnson is a resident of Dallas County, Texas. Service of process on Defendant Johnson may be accomplished by serving his attorney, Phillip N. Smith, BAKER & BOTTS, 2001 Ross Avenue, Suite 800, Dallas, Texas 75201, who has indicated he will accept service on behalf of such Defendant.

II.

This Court has jurisdiction over this suit because it is a suit for damages in an amount in excess of the minimum jurisdictional limits of this Court. This Court further has venue over this cause of action because (1) Plaintiff's cause of action arose in whole or in part in Dallas County, Texas; (2) one or more of the individual Defendants is a resident of Dallas County, Texas; and (3) corporate Defendant EDS has its principal place of business, as well as an agent or representative, in Dallas County, Texas. No mandatory venue provision exists which would mandate venue as to any of the Defendants in any other county.

III.

Anderson is a well qualified individual, by virtue of education, training, and work experience, in the fields of finance, financial management, investments, and investment portfolio management. Anderson has a Bachelor of Business Administration degree with a major in Finance from the University of Oklahoma/Central State University, and a Masters Degree in Business Administration in Finance/Management from Central State University. Prior to October 1984, Anderson had worked as an assistant cashier for the First State Bank & Trust Company of Guthrie, Oklahoma, at United Oklahoma Banc Shares in Oklahoma City, Oklahoma in a variety of positions including Assistant Vice President in the investment department, as a General Manager Trainee for Marlin Hydrocarbon, Inc. of Guthrie, Oklahoma and as the Economic and Planning Coordinator for Petro-Lewis Corporation (Mid Continent Region) of Oklahoma City, Oklahoma.

IV.

On October 15, 1984, Anderson was employed by Defendant EDS for a managerial position in the Domestic Treasury Department of Defendant EDS. From October 1984 to October 1985, Anderson served as the Cash Manager in the Domestic Treasury Department, where his responsibilities included management of all cash operations, short term investments, cash forecasting, and related information systems plus consulting with various groups within the EDS system. In October of 1985, Plaintiff was promoted to position of Manager of Investments and Debt in the Domestic Treasury Department. In that position, Plaintiff had responsibilities for all domestic short and long-term investments for all pension portfolios, corporate portfolios, and Title IX portfolios. In this position, Plaintiff was charged with the responsibility of administering investment assets totaling approximately 1.3 billion dollars. In addition, Anderson was responsible

for all Domestic lines of credit as well as all letters of credit and all related investment systems plus consulting for various groups within EDS.

V.

In his position as Manager of Investments and debt in the Domestic Treasury Department, Anderson never lost money from the investments he initiated on behalf of the various EDS entities in his charge. His performance in his job was consistently judged to be superior by his supervisors and others, and he received numerous commendations on his performance. Prior to January 1988, Anderson had never received any reprimands for or complaints about his performance in his position with EDS.

VI.

In his position as Cash Manager in the Domestic Treasury Department of EDS, Anderson reported directly to Crow, who held the position at that time as Assistant Treasurer of the Domestic Treasury Department of EDS. Crow in turn reported to Weynand, who was the Treasurer/Comptroller and Vice-President of EDS Corporation.

VII.

During the course of his employment with EDS, Anderson was asked by Crow, his immediate supervisor, to commit certain illegal acts, at Crow's direction. These illegal acts included;

1. Being asked to sign on two separate occasions approval of payment invoices on behalf of the pension portfolios under his management and supervision who had been retained by Crow without approval of the pension trustees. Such action would have been a violation of the Federal Employee Retirement Income Security Act of 1974 ("Erisa") Laws governing management of such pension plans.

2. Plaintiff was asked by Crow to intentionally fail investment transactions made on behalf of EDS. The apparent motive behind such a request was Crow's effort to get another manager in the EDS system, who was associated with the transaction in question, in trouble with EDS management. Such intentional failure of an investment transaction would have been a violation of various laws and regulations promulgated and enforced by the Federal Securities and Exchange Commission.

3. Plaintiff was also asked to write up minutes for meetings which he did not attend in connection with the EDS Retirement Plan. This also is in violation of ERISA.

4. Crow also asked Plaintiff to falsify interest income projections, thereby committing criminal fraud, in connection with the ZX Hierarchy Revenue Account. This account was used as a repository for interest income generated by investments managed by Anderson's department. By deliberately under-reporting the projected income in such account, Crow was able to use the income in the account in excess of the under-reported projections to make purchases in the department and pay expenses without the required approval of his superiors, in complete circumvention of the EDS Financial Accounting System/Budget for the Domestic Treasury Department, and without any type of accounting to anyone within EDS for where the money would be going. Because the corporate management at EDS did not expect income in the ZX Hierarchy account to exceed the under-reported projections, Crow, by under-reporting the income projections, in essence created a pool of funds in the ZX Hierarchy Account from which expenditures or disbursements could be made at Crow's sole discretion and under his sole control.

VIII.

Plaintiff refused these requests to permit illegal acts thereby incurring the enmity of Crow including verbal threats made to Anderson by Crow on three separate occasions. In several instances, after Anderson had refused to perform the illegal acts, Crow either performed them himself or forced other employees of EDS Corporation to perform such acts.

IX.

Additionally, during the course of his employment, Plaintiff became aware that Crow was engaging in various illegal acts, or unauthorized activities, himself. The illegal or unauthorized activities of which Plaintiff became aware, in addition to those previously listed in which Plaintiff was asked by Crow to participate, included the following:

1. Insider trading by Crow with respect to EDS stock, Class E stock in the General Motors Corporation which arose from an October 18, 1984 purchase of EDS by the General Motors Corporation, and subsequent trades thereafter in both GM stock and stock of various third parties who contracted with EDS. In particular, Crow purchased substantial volumes of EDS stock prior to the merger with General Motors, at a time when Crow was aware of the pending purchase by General Motors by virtue of his position within EDS but the General Public had not yet been advised of the pendency of the purchase. When the General Motors takeover was announced, EDS stock substantially rose in value and Crow was able to make a substantial profit as a result of his insider knowledge regarding the proposed transaction.

2. Crow engaged in various conflict of interest transactions with vendors and suppliers of products and services of

EDS. Crow utilized favored vendors and awarded them contracts without letting such contracts out for bids, as required by EDS as established procedures. Crow further utilized his influence within EDS and over his subordinates in his department to eliminate work done by competitors of these favored firms, and to force contracts to be given to these favored firms, even though such contracts were unauthorized, or unapproved by the necessary parties within the EDS system, and even though the services and products offered by these favored vendors were of lessor quality and/or higher cost than similar products offered by other parties.

3. Making unauthorized purchases of equipment.

4. Misuse of corporate funds related to various products within his department.

5. Requesting that bank accounts be intentionally overdrafted and that individuals in the department intentionally lie to various department heads of other subsidiaries in order to hide the fact that checks were being written within the department without proper authorization.

6. Violations of the internal written code of ethics promulgated by EDS for its employees.

X.

In January, 1988, Anderson approached Darrell Johnson, the Assistant Treasurer over the International Treasury Department of EDS who basically held a management position equivalent to that of Crow in another department, about the illegal activities in which he had been asked to participate by Crow and about the other irregularities which Crow had committed. Anderson made Johnson aware that EDS was about to be audited by auditors from General Motors Corporation, and stressed to Johnson that if

these problems surfaced during the audit process, EDS and the entire department would be substantially damaged. Between January of 1988 and May of 1988, Anderson made detailed, specific, and written reports to Johnson regarding Crow's activities. At Anderson's request, Johnson was asked to raise these concerns with Weynand and to investigate these perceived problems further.

XI.

In May or June 1988, Johnson brought to Weynand's attention, the problems regarding Crow's activities. Weynand, rather than conducting an investigation or taking corrective action, instead made known to Crow the allegations that had been made by Anderson regarding Crow's activities. From that point forward, Weynand and Crow actively sought occasion to discriminate against and ultimately terminate Plaintiff from his employment with EDS because of his refusal to participate in illegal activities at Crow's direction and because of the allegations which he had leveled against Crow's activities within the department.

XII.

Although Anderson's performance within the department continued to be superior, in January 1989, Anderson was informed by Crow that he was being demoted to a managerial position one level below that previously held by him. Anderson's investment responsibilities were taken from him and turned over to another individual in his department who had no investment experience whatsoever. The demotion was solely motivated by a desire on the part of Weynand and Crow, acting as managerial agents and employees of EDS, to retaliate against Anderson for his refusal to participate in the illegal activities and for his reporting of the irregular activities of Crow to his superior. The demotion was also part of a well organized plan on the part of Crow, Weynand, and EDS to find a reason to get Anderson out of

the department and retaliation for his refusal to participate in illegal activities and in retaliation for his leveling charges of irregular conduct against Crow. Upon notification of the demotion, Anderson immediately spoke with EDS in-house counsel and also spoke with Davis Hamlin (Chief Financial Officer) at EDS regarding this matter and was subsequently reinstated approximately one week later.

XIII.

Despite a continuance of his superior performance, Plaintiff was terminated from his employment with EDS on August 23, 1989. The termination of employment was made solely in retaliation against Plaintiff for his refusal to participate in illegal activities of Crow's request and in retaliation for his leveling of additional charges against Crow regarding Crow's irregular performance and for the subsequent embarrassment this created for senior management of EDS.

XIV.

Since his termination at EDS, Plaintiff has interviewed with numerous companies throughout the United States seeking a management level position within his field in finance, financial management, and investments. A number of respective employers have expressed interest in retaining Anderson as an employee in such a position, but in each instance have been dissuaded from giving Plaintiff employment in this field by the comments and remarks of EDS, Crow, Weynand, Shlakman, and/or Johnson. Such conduct and remarks by EDS were done solely with the intent of denying Plaintiff employment in his field in retaliation for his refusal to participate in illegal acts at Crow's direction and because of his reporting of the illegal or irregular activities of Crow's direction and because of his reporting of the illegal or irregular activities of Crow to his superiors in the EDS system.

XV.

At all times relevant to this cause of action, Crow, Weynand, Shlakman and Johnson have been management level employees and officers of EDS at all time relevant to this cause of action, Crow, Weynand, Shlakman and Johnson have been acting in the course and scope of their employment for EDS.

XVI.

EDS has breached its contract of employment with Plaintiff and has wrongfully discharged Plaintiff from his position of employment with EDS, by demoting and then discharging Plaintiff from his position of employment at EDS because of, and in retaliation for, Plaintiff's refusal to commit illegal activities at Crow's request and because of his reporting of Crow's own illegal or irregular activities to EDS Management. Such breach of contract and such wrongful termination is a proximate cause of damages to Plaintiff.

XVII.

Further, Defendants Crow, Weynand, Shlakman, Johnson, and EDS have intentionally and tortiously interfered with Plaintiff's perspective business and prospective contractual relationships with other prospective employers following his wrongful discharge with EDS. Such interference was done maliciously, with the intent to retaliate against Plaintiff for his refusal to participate in illegal activities and for his reporting of the illegal or irregular activities of Crow, and was done without legal justification or excuse. Such acts of interference have been a proximate cause of damages to Plaintiff.

XVIII.

Further, Defendants Crow, Weynand, Shlakman, Johnson, and EDS have negligently, or in the alternative intentionally,

sought to inflict emotional distress to Anderson in retaliation for Anderson's refusal to participate in illegal activities at Crow's direction and reporting of Crow's own illegal or irregular activities. Such actions have in fact been a proximate cause of emotional distress and other damages to Plaintiff.

XIX.

As a direct and proximate result of the above and foregoing activities on behalf of Defendants, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court. The elements of the Plaintiff's actual damage include past and future mental anguish, past and future loss of earning capacity, past and future loss of fringe benefits, and past and future incidental and consequential damages.

XX.

Further, Defendants Crow, Weynand, Shlakman, Johnson, and EDS have committed the above and fore-mentioned actions with malice and intentionally. Alternatively, Defendants Crow, Weynand, Shlakman, Johnson, and EDS have committed such actions in conscious disregard of the rights and welfare of Anderson and other similarly situated, and therefore have acted with gross negligence. Such actions by Defendant are a proximate cause of damage to Plaintiff. The aforementioned acts were further committed by Defendant EDS by its managerial agents or vice-principals, or alternatively, were authorized or ratified by Defendant EDS. Accordingly, Plaintiff is entitled to recover exemplary damages from Defendants Crow, Weynand, Shlakman, Johnson and/or EDS. The amount of exemplary damages sought by EDS are in excess of the minimum jurisdictional limits of this Court.

XXI.

Further, Plaintiff has been forced to retain the undersigned attorney in order to prosecute his claims against Defendants EDS, Crow, Weynand and Shlakman. Plaintiff has promised to pay said attorney reasonable fee in Dallas County, Texas for legal services necessarily expended or incurred in connection with the prosecution of these claims and the prosecution of this suit. Plaintiff has heretofore made written demand upon Defendants in connection with this claim more than thirty days prior to the institution of this suit. Plaintiff is therefore entitled to recover his reasonable attorneys fees, both through the trial and on appeal from Defendants pursuant to §38.001 et. seq. of the Texas Civil Practice and Remedies Code. The amount of the attorneys fees sought in this regard is in excess of the minimal jurisdictional limitations of this court.

WHEREFORE, PREMISES CONSIDERED Plaintiff prays that Defendants be cited to appear herein, that upon final hearing hereof, Plaintiff do have and recover judgment of and from Defendants, jointly and severally, for Plaintiff's actual damages, pre-judgment interest on such actual damages, cost of suit, and post-judgment interest on such amounts; that Plaintiff further do have and recover judgment of and from Defendants severally for exemplary damages with post-judgment interest on such amounts; for such other and further relief both at law and in equity, to which the Plaintiff may show himself to be justly entitled and to which he will ever pray.

Respectfully submitted,

STRADLEY, SCHMIDT, AND WRIGHT
One, Campbell Centre
Dallas, Texas 75206
(214) 696-4880
Fax: 696-8134

By _____
C. L. MIKE SCHMIDT, P.C.
State Bar No. 17766000
Attorneys for Plaintiffs

B-1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE RAYMOND (ANDY) ANDERSON	)	
vs.	)	
ELECTRONIC DATA SYSTEMS CORP., DOUGLAS M. CROW, ANTHONY E. WEYNAND, AND RICHARD P. SHLAKMAN, DARRELL JOHNSON	)	CIVIL ACTION NO. CA3-91-1489-G

MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW GEORGE RAYMOND (ANDY) ANDERSON, Plaintiff in the above styled and numbered cause, and files this his Motion to Remand, and as grounds therefore would show the Court the following:

I.
PROCEDURAL HISTORY OF THE CASE

1. This is a cause of action arising out of Plaintiff's former employment with Defendant Electronic Data Systems Corporation ("EDS"). Plaintiff filed this cause of action in the 191st Judicial District Court of Dallas County, Texas. His suit was based upon allegations of wrongful discharge and other tortious conduct by Defendants, and his cause of action was predicated entirely upon the law of the state of Texas. No federal causes of action were alleged in Plaintiff's petition.

2. As a part of his wrongful discharge claim, Plaintiff alleged in his Plaintiff's Original Petition that he had been terminated by EDS in whole or in part because he had refused to participate in illegal activities which he had been directed to perform by his supervisor at EDS, Defendant Douglas M. Crow ("Crow"). Certain of those activities would, had Plaintiff performed them, have been in violation of the Employee Retirement Income Security Act ("ERISA"), Plaintiff's job at EDS having been at least in part to participate in the administration of pension and profit sharing plans of EDS. Plaintiff's Original Petition alleged that his refusal to perform violations of ERISA as a plan administrator was a reason in whole or in part for his termination.

3. Such allegations stated a cause of action for wrongful discharge under the common law of the state of Texas. No cause of action was stated by Plaintiff under ERISA, and no damages were sought by Plaintiff against Defendants because of claims handling of ERISA benefit claims. The refusal of Plaintiff to violate ERISA was pled merely as one of the improper reasons for Plaintiff's termination by EDS, and formed a portion of the allegations which comprised Plaintiff's claim for common law wrongful discharge.

4. Defendants thereafter timely removed this case from state court to this Court in July 1991. The basis for the removal was federal question jurisdiction arising from the allegations involving ERISA, which Defendants alleged triggered the exclusive federal jurisdiction provisions of ERISA itself.

5. Subsequent to the removal, Plaintiff in October 1991 filed his First Amended Original Complaint under leave granted by this court. **The First Amended Original Complaint eliminated all references to ERISA, even as a reason for Plaintiff's wrongful termination.** The First Amended Original Complaint is Plaintiff's current live pleading.

GROUNDS FOR REMAND

6. The motion to remand is based upon the absence of subject matter jurisdiction.

7. There is no federal question jurisdiction in this cause of action. Plaintiff's current live pleading has eliminated all references to ERISA, and the references to ERISA formed the basis of the removal by Defendants from state court. Even assuming, therefore, that Plaintiff's Original Petition properly invoked federal question jurisdiction under ERISA[1], that basis for federal question jurisdiction has been eliminated and there is presently no basis for federal question jurisdiction in this court over any aspect of Plaintiff's claim.

8. There is similarly no other basis of federal jurisdiction over the removed action. Plaintiff and Defendants are non-diverse, private parties, and Plaintiff's cause of action is one brought under state law.

9. The only remaining claims now pending before the Court, therefore, are Plaintiff's claims for wrongful discharge and other tortious conduct by Defendants, which are actionable under Texas state law. This Court has jurisdiction of such claims only within this Court's supplemental jurisdiction under 28 U.S.C. § 1367. However, 28 U.S.C. § 1367(c)(3) permits the Court to decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. Plaintiff would show the Court that since all bases for federal jurisdiction have been eliminated by pleading amendment, this court should decline to exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3) and (4).

---

[1] Plaintiff makes this assumption for purposes of argument only. Plaintiff would take the position that his Original Petition did not support removal under ERISA and that the case was improvidently removed. However, that issue has been rendered moot by the subsequent amendment to Plaintiff's pleadings to eliminate all ERISA references.

10. Plaintiff would show the court that the refusal of this court to exercise supplemental jurisdiction would be particularly appropriate under the procedural posture of this case as it presently exists. This case has been pending in federal court for only a little over three months. The parties have conducted only written discovery, no depositions have been taken, and there is no immediate trial setting. Indeed, the case could probably be reached for trial sooner in state court than in federal court, given the crowded condition of this court's docket. Remand at this time of the remaining state law claims would work no hardship on any party.

11. Further, Plaintiff would show the court that a basic refusal to exercise supplemental jurisdiction exists under 28 U.S.C. § 1367(c)(1) because Plaintiff's claim in part raises unsettled and important questions of Texas law. Plaintiff's wrongful discharge claim is based in part upon allegations that he is terminated for recording illegal activity committed by Crow to EDS. The exact perimeters of this type of "whistle blower" wrongful discharge cause of action remain unsettled under Texas law following the decision in *Winters v. Houston Chronicle Publishing Company*, 795 S.W.2d 723 (Tex. 1990). Such unsettled issues are best left to state courts for determination.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this motion to remand be granted, and that this case be remanded to the 191st District Court of Dallas County, Texas.

Respectfully submitted,

STRADLEY, SCHMIDT & WRIGHT
ONE CAMPBELL CENTRE
DALLAS, TEXAS 75206
(214) 696-4880
FAX # (214) 696-8134

BY: C. L. MIKE SCHMIDT
C. L. MIKE SCHMIDT
STATE BAR NO. 17766000

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record by certified mail, return receipt requested, this 5th day of December, 1991.

C. L. MIKE SCHMIDT
C. L. MIKE SCHMIDT

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a

benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach, or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

D-1

NO. 93-1606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE RAYMOND ANDERSON
Appellant,
v.
ELECTRONIC DATA SYSTEMS CORP., DOUGLAS M. CROW, ANTHONY E. WEYNAND, RICHARD P. SHLAKMAN, and DARRELL JOHNSON,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
91-7509-M

BRIEF OF APPELLEES

PHILLIP N. SMITH, JR.
JEFFREY A. CARTER
MICHAEL A. PIAZZA

McKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (facsimile)

Attorneys for Appellees,
ELECTRONIC DATA SYSTEMS CORPORATION, ANTHONY E. WEYNAND, RICHARD P. SHLAKMAN, AND DARRELL JOHNSON

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities may have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Electronic Data Systems Corporation, a subsidiary of General Motors Corporation
2. Douglas M. Crow
3. Anthony E. Weynand
4. Richard P. Shlakman
5. Darrell Johnson
6. George Raymond (Andy) Anderson
7. Phillip N. Smith, Jr., Jeffrey A. Carter, and Michael A. Piazza, attorneys with McKool Smith, P.C.
8. J. Thomas Scott, attorney with Electronic Data Systems Corporation
9. John R. Woodward and Patrick Shaw, attorneys with Woodward and Shaw
10. C. L. Mike Schmidt and Ronald Wren, attorneys with the Law Offices of C. L. Mike Schmidt
11. Kenneth W. Biermacher, attorney with Kane, Russell, Coleman & Logan
12. Cheryl P. Hunter and Jon W. Laasch, attorneys with Hammons and Hunter

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument.

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STATEMENT OF JURISDICTION

The Appellees removed this case from Texas state court to the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1441. Removal was based on allegations in the Original Petition that Appellant George Raymond Anderson ("Anderson") had been wrongfully terminated because he refused to violate the Employee Retirement Income Security Act. At the time of removal, the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. At the time the district court entered summary judgment for Electronic Data Systems Corp. ("EDS"), it had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332.

This Court has jurisdiction of Anderson's appeal as to EDS, pursuant to 28 U.S.C. § 1291. The district court entered final judgment on June 4, 1993. As discussed in the accompanying Motion to Dismiss Appeal, this Court does not have jurisdiction over the other named appellees. Anderson voluntarily dismissed the other appellees in April 1993.[1]

STATEMENT OF THE ISSUE ON APPEAL

Did the United States District Court for the Northern District of Texas have subject matter jurisdiction when it entered summary judgment in favor of EDS on Anderson's claim for wrongful discharge?

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[1] In the event this Court denies the motion of Anthony E. Weynand, Richard P. Shlakman, and Darrell Johnson to dismiss this appeal as to them, this Brief is filed on their behalf as well as on behalf of EDS. By joining in this Brief, Messrs. Weynand, Shlakman, and Johnson do not intend to waive or forego any rights they might have to the dismissal of this appeal as to them.

STATEMENT OF THE CASE

A. Nature of the Case.

Appellant George Raymond Anderson ("Anderson"), an employee at-will under Texas law, alleges that Appellee Electronic Data Systems Corporation ("EDS") wrongfully terminated him for refusing to commit illegal acts requested of him by his supervisor and for accusing his supervisor of committing certain improper acts. In his Original Petition, Anderson, *inter alia*, alleged that his supervisor asked him to violate the Employee Retirement Income Security Act ("ERISA") and that his refusal to violate ERISA led to his termination.

Anderson filed this action originally in state court against EDS and others (collectively, the "Defendants"). The Defendants removed to federal court. Anderson voluntarily dismissed all Defendants, but EDS. EDS obtained summary judgment on Anderson's claims. On appeal, Anderson does not challenge the propriety of the court's summary judgment ruling. Instead, he challenges the district court's denial of his motion to remand the case to state court. The only issue before this Court is whether the district court had subject matter jurisdiction to enter summary judgment in favor of EDS.

B. Course of Proceedings and Disposition of Case.

On June 26, 1991, Anderson filed suit in state court in Dallas County against EDS, and four present or former EDS employees, Douglas M. Crow ("Crow"), Anthony E. Weynand ("Weynand"), Richard P. Shlakman, and Darrell Johnson.[2] On July 25,

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[2] Plaintiff's Original Petition ¶ 1 (hereinafter "Original Petition") (R. 92-104). The unsealed portions of the record are cited in this brief by referring to the page number of the record as follows: "R.___." The sealed portions of the record are identified by asterisks on the docket sheet and are cited in this brief as "R. Sealed" along with reference to the document's docket number and date filed.

1991, the Defendants joined in removing the case to the Northern District of Texas, Dallas Division.[3]

Anderson filed his first amended complaint in October 1991 and purportedly dropped all references to ERISA. In November 1991, Defendant Crow moved for summary judgment. In December 1991, in conjunction with filing his response to Crow's motion for summary judgment, Anderson moved to remand the case to Texas state court. The District Court denied Anderson's remand motion on January 7, 1992. After two extensions requested by Anderson, the district court granted Crow's motion for summary judgment in December 1992.

In April 1993, Anderson filed a second amended complaint. He voluntarily dismissed all Defendants except EDS and dismissed all claims against EDS except for his claim of wrongful termination. After briefing, the district court granted EDS' motion for summary judgment on the remaining claim in June 1993.

Anderson appealed. He now challenges the district court's refusal to remand the case to state court. He does not, however, appeal either of the court's summary judgment rulings.

C. Statement of Facts.

Anderson joined the Domestic Treasury Department of EDS in October 1984 as a cash manager.[4] Subsequently, Anderson

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[3] Notice of Removal (R. 1-5). Anderson admitted in his "Motion to Remand" that the Defendants timely removed this case from state court. Motion to Remand p. 2, dated December 5, 1991 (R. 300). His argument on appeal is limited solely to whether the district court had subject matter jurisdiction.

[4] Original Petition ¶ IV (R. 94-95); Second Amended Complaint ¶ 5 (R. 673); Anderson Deposition at pp. 24, 27-28 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza). At the time Anderson joined EDS, he signed an employment agreement which provided that either Anderson or EDS could terminate the employment relationship at

became the Department's Manager of Investments and Debt. According to Anderson, he was responsible for all domestic long and short-term investments for all of the investment portfolios of EDS, including EDS' pension funds.[5] Until January 1989, Anderson reported to Crow, the assistant treasurer of EDS.[6]

In January 1989, Crow developed a plan to reorganize the Domestic Treasury Department. Anderson believed that he was being demoted under the proposed plan and complained to Weynand, Crow's boss.[7] Shortly after he went to Weynand, Weynand told Crow to drop his plan and informed Anderson that the reorganization proposed by Crow would not be implemented.[8]

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any time, with or without cause. Anderson Deposition at pp. 24-25; Employment Agreement ¶ 7 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts and Exhibit B attached to Affidavit of Michael A. Piazza).

[5] Original Petition ¶ IV (R. 94-95); Second Amended Complaint ¶ 5 (R. 673).

[6] Original Petition ¶ VII (R. 96-97); Second Amended Complaint ¶ 7 (R. 673-674); Anderson Deposition at p. 19 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza).

[7] Second Amended Complaint ¶¶ 7, 14, and 15 (R. 673-674, 676-677); Anderson Deposition at pp. 141-43, 146-47, and 149-50 (R. Sealed Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza); Affidavit of Anthony E. Weynand ("Affidavit of Weynand") ¶ 6 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

Anderson also complained to Weynand's boss, Davis Hamlin ("Hamlin"). Second Amendment Complaint ¶¶ 7, and 15 (R. 673-674, 676-677); Anderson Deposition at pp. 146-147, and 149-50 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza).

[8] Affidavit of Weynand ¶ 6 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

Based on his conversation with Anderson and with other Domestic Treasury employees, Weynand decided to reassign Crow. In Weynand's judgment Crow could no longer effectively manage the Domestic Treasury Department.[9] Weynand assigned Crow to a position outside the Department and in another building.[10]

Weynand named Don Ulm ("Ulm") to replace Crow as the assistant treasurer and placed Ulm in charge of the Domestic Treasury Department.[11] Ulm had not worked in the Domestic Treasury Department nor had he ever discussed Anderson with anyone before being named assistant treasurer.[12]

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[9] *Id.* at ¶ 7 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

[10] Second Amended Complaint ¶ 15 (R. 676-677); Anderson Deposition at p. 153 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza); Affidavit of Weynand ¶ 7 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

During his conversations with Weynand and Hamlin, Anderson accused Crow of improper and unethical conduct. Original Petition ¶¶ XI, XII (R. 99-100); Second Amended Complaint ¶¶ 13,15 (R. 676-677).

Weynand and Hamlin investigated Anderson's accusations against Crow, but uncovered no evidence of wrongdoing on the part of Crow. Affidavit of Weynand ¶ 7 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993); Second Amended Complaint ¶ 15 (R. 676-677).

[11] Second Amended Complaint ¶ 15 (R. 676-677); Anderson Deposition at p. 154 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza); Affidavit of Weynand ¶ 7 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993). Anderson did not name Ulm as a defendant.

[12] Affidavit of Don Ulm ("Affidavit of Ulm") ¶ 5 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

Neither Crow, Anderson, Weynand, not anyone else at EDS informed Ulm of Anderson's accusations against Crow. *Id.* at ¶¶ 10-12

In August 1989, based on his experience in supervising Anderson since January 1989, Ulm concluded that Anderson was a poor manager and exercised poor judgment.[13] Ulm believed that Anderson too often treated his employees, and the vendors and brokers doing business with the Domestic Treasury Department, rudely and in an unprofessional manner.[14] He further believed that Anderson's behavior was inappropriate as a manager and representative of EDS.[15] Ulm terminated Anderson on August 23, 1989.[16]

(R. Sealed, Docket Numbers 71-75, Filed May 4, 1993); Affidavit of Weynand ¶ 8 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993); Anderson Deposition at p. 155 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza).

[13] Affidavit of Ulm ¶ 6 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

[14] *Id.* (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

[15] *Id.* (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

[16] *Id.* at ¶ 9 *Id.* (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993); Anderson Deposition at p. 28 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza).

Ulm's decision to terminate Anderson was his own. No one at EDS instructed him to, requested him to, or suggested to him that he terminate Anderson. Affidavit of Ulm at ¶¶ 7-9 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993); Affidavit of Weynand at ¶ 9 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

Anderson alleged that Crow was involved in his termination. In ruling on Crow's motion for summary judgment, the district court, however, found that Anderson had failed to produce any evidence of Crow's involvement. Memorandum Order dated December 2, 1992, p. 4 (R. 634).

Subsequently, Anderson admitted that he had no factual basis to support his claim that Crow was involved in his termination nor any evidence to dispute Ulm's testimony that Ulm alone made the decision to terminate Anderson. Anderson Deposition at pp. 120-23, 185-86 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposi-

On June 26 1991, Anderson sued the Defendants in state court in Dallas County, Texas. In his Original Petition, Anderson alleged that EDS breached its employment agreement with him by wrongfully discharging him.[17]

Specifically, Anderson contended that he was terminated because (i) he refused to participate in illegal activities requested by Crow, (ii) he reported Crow's illegal or irregular performance of his duties to EDS management, and (iii) his accusations against Crow embarrassed the management of EDS.[18] Anderson listed four allegedly illegal acts that he claimed Crow asked him to do, two of which involved alleged violations of ERISA.[19] Anderson alleged that Crow asked him:

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tion Excerpts attached to Affidavit of Michael A. Piazza).

In addition, Ulm's uncontradicted testimony was that he did not terminate Anderson because Anderson refused to perform illegal acts that Crow allegedly asked him to perform. He was not aware of Anderson's allegations in this regard when he terminated Anderson. Affidavit of Ulm ¶¶ 10-12 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

Anderson never alleged that Ulm or anyone other than Crow ever requested him to perform illegal acts. He also never alleged any wrongdoing on the part of Ulm. Anderson Deposition at p. 244 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition Excerpts attached to Affidavit of Michael A. Piazza).

[17] Original Petition ¶¶ XVI (R. 101-102). He also alleged that all of the Defendants had intentionally interfered with his prospective business and contractual relationships and had negligently or intentionally inflicted emotional distress on him. *Id.* ¶¶ XVII and XVIII (R. 102).

[18] Original Petition ¶ XIII (R. 100).

[19] Original Petition ¶ VII (R. 96-97).

Anderson also alleged that Crow asked him (i) not to provide certain stock certificates needed to close an acquisition by EDS, which Anderson alleged violated "*various laws and regulations promulgated and enforced by the Federal Securities and Exchange Commission,*" and (ii) to under-report to EDS senior management the interest income he

> to sign on two separate occasions approval of payment invoices on behalf of the pension portfolios under his management and supervision who (sic) had been retained by Crow without approval of the pension trustees. *Such action would have been a violation of the Federal Employee Retirement Income Security Act of 1974 ("Erisa") Laws governing management of such pension plans.*
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> to write up minutes for meetings which he did not attend in connection with the EDS Retirement Plan. *This also is in violation of ERISA.*[20]

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was projecting EDS would make on one of its accounts used as a repository for interest income generated by EDS' investments. Anderson did not allege what law he would have violated if he had under-reported the projected income. *Id.* (R. 96-97) (emphasis added).

[20] *Id.* at ¶ VII (R. 96-97) (emphasis added).

In answers to interrogatories served after the case was removed, Anderson further described the conduct Crow allegedly asked him to do in violation of ERISA: (i) to approve invoices for the payment of a consultant, from the funds of EDS' retirement plan, even though the trustees of the retirement plan had not approved hiring the consultant and (ii) to draft minutes for meetings of the trustees of the retirement plan, meetings which Anderson had not attended. Anderson stated that he refused to sign the invoices or draft the minutes and told Crow that both would constitute violations of ERISA. Plaintiff's Responses to Douglas M. Crow's Interrogatories (August 1, 1991), Answer to Interrogatory 5 (hereinafter "Anderson Interrogatory Answer __") (Volume 4 of the Record, R. 53-55, Exhibit to Crow's Brief in Support of Motion for Summary Judgment).

Anderson also answered that Crow violated ERISA (i) by asking Anderson to write the meeting minutes and (ii) by hiring a consultant to work on projects for EDS's retirement plan without trustee approval. Anderson Interrogatory Answer 11 (Volume 4 of the Record, R. 58-60, Exhibit to Crow's Brief in Support of Motion for Summary Judgment).

Anderson also identified five people with knowledge of either the "EDS Retirement Plan," "authorizing payment of invoices without budget approval/trustee approval," or "problems associated with the 401(k) and EDS Retirement Plan." Anderson Interrogatory Answer 1

Anderson further alleged that when he refused to do the acts requested by Crow, Crow either did them himself or forced someone else to do them.[21] Anderson also alleged that Crow threatened him on three separate occasions after he refused to commit the illegal acts.[22] In addition, Anderson alleged that Crow and Weynand "actively sought occasion to discriminate against and ultimately terminate" him because he refused to commit the illegal acts and because of his accusations against Crow.[23]

On July 25, the Defendants jointly removed the case to federal court.[24] The Defendants maintained that Anderson's allegations that he was terminated because he refused to violate provisions of ERISA gave the district court subject matter jurisdiction.[25]

In October 1991, Anderson filed his First Amended Original Complaint.[26] In his amended complaint, Anderson purported to drop all reference to the ERISA violations.

Anderson moved to remand the case to Texas state court in December 1991.[27] In his motion, Anderson explained that part of his job involved the administration of EDS' pension and profit

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(Volume 4 of the Record, R. 44-51, Exhibit to Crow's Brief in Support of Motion for Summary Judgment).

[21] Original Petition ¶ VIII (R. 97).

[22] *Id.* (R. 97).

[23] *Id.* at XI (R. 99). Anderson later dropped this allegation. *See* Plaintiff's Second Amended Complaint ¶¶ 12-15 (R. 675-677).

[24] Notice of Removal (R. 1-5)

[25] *Id.* (R. 1-5)

[26] Plaintiff's First Amended Original Complaint dated October 21, 1991 (R. 187-200).

[27] Motion to Remand dated December 5, 1991 (R. 299-303).

sharing plans.[28] He admitted that certain of the illegal activities Crow directed him to perform would have violated ERISA had he performed them.[29] He further admitted that his "Original Petition alleged that his refusal to perform violations of ERISA as a plan administrator was a reason in whole or in part for his termination."[30] Anderson additionally admitted that "[t]he refusal of Plaintiff to violate ERISA was pled merely as one of the improper reasons for Plaintiff's termination by EDS, and *formed a portion of the allegations which comprised Plaintiff's claim for common law wrongful discharge.*"[31] Anderson maintained, however, that his ERISA allegations did not give the district court federal question jurisdiction.[32]

The Defendants responded and argued that removal was proper under the Original Petition and that Anderson could not defeat the district court's jurisdiction by amending his complaint

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[28] *Id.* at p. 2 (R. 300).

[29] *Id.* (R. 300).

[30] *Id.* (R. 300).

[31] *Id.* at p. 2 (R. 300) (emphasis added).

[32] *Id.* at p. 3 (R. 301). Alternatively, Anderson argued that the Defendants' removal had been predicated on the references to ERISA in the Original Petition, that he had "eliminated all references to ERISA" in his First Amended Original Petition," and that the "issue ha[d] been rendered moot by the subsequent amendment to Plaintiff's pleadings to eliminate all ERISA references." Id. at p. 3 and n. 1 (R. 300-301).

Finally, Anderson admitted that the district court had supplemental jurisdiction of the case under 28 U.S.C. § 1367, but urged the court to decline that jurisdiction based on the fact that "all bases for federal jurisdiction ha[d] been eliminated by the pleading amendment." *Id.* at p. 4 (R. 302).

to delete the basis for federal jurisdiction.[33] The district court denied Anderson's motion to remand on January 7, 1992.[34]

In November 1992, counsel for Anderson wrote a letter to defense counsel reciting an agreement between counsel that Anderson intended to file an amended complaint and dismiss the individual defendants from the case. Counsel for Anderson further represented that Anderson would "not be making any ERISA claims" in the new amended pleading.[35]

In April 1993, Anderson filed his Second Amended Complaint.[36] In that complaint, Anderson dismissed all claims against all of the Defendants except EDS and dismissed all claims against EDS except for wrongful termination based on his refusal to commit illegal acts and his accusations against Crow.[37]

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[33] Defendants' Response to Plaintiff's Motion to Remand pp. 4-8, dated December 30, 1991 (R. 322-326). *See, e.g., St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 58 S.Ct. 586, 593 (1938) (after filing petition over which federal court has original jurisdiction, plaintiff can not, at his election, subsequently act to defeat that jurisdiction or defendant's right to remove); *Brown v. Southwestern Bell Telephone Co.,* 901 F.2d 1250, 1255 (5th Cir. 1990) (federal court's should guard against forum shopping when plaintiff deletes his federal claims and then requests the court to remand the case); *In re Carter,* 618 F.2d 1093, 1101 (5th Cir. 1980), *cert. denied,* 101 S.Ct. 1410 (1981) ("the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction.").

[34] Order dated January 7, 1992 (R. 331).

[35] Letter from C. L. Schmidt, attorney for Anderson, to Phillip N. Smith, Jr., attorney for all of the named Defendants but Crow, dated November 16, 1992 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Exhibit "D" to Affidavit of Michael A. Piazza).

[36] Second Amended Complaint filed April 13, 1993 (R. 672-679).

[37] *Id.* (R. 672-679). In his motion for leave to file the Second Amended Complaint, Anderson expressly asked for leave to dismiss his claims against each of the individual defendants. Motion for Leave to

After Anderson dropped his ERISA based claims, EDS moved for summary judgment based on the remaining claims against it. EDS argued that as a matter of law (i) Anderson was an employee-at-will who could be discharged for no cause, (ii) Anderson did not fall within the *Sabine Pilot*[38] exception to the employment-at-will doctrine, and (iii) Anderson's claim that he was terminated for reporting the illegal or irregular conduct of Crow did not state a cause of action for wrongful termination or anything else under Texas law.[39]

The district court granted summary judgment. It found that Texas did not recognize a "whistle blower" cause of action under the facts alleged by Anderson. The court further found that Anderson was an employee-at-will who failed to meet the requirements of the *Sabine Pilot* exception.[40] The court entered judg-

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File Plaintiff's Second Amended Complaint p. 2, dated March 5, 1993 (R. 647).

After filing the Second Amended Complaint, counsel for Anderson and EDS had the following colloquy at Anderson's deposition regarding Anderson's ERISA claims:

> Mr. Smith: Mike, let me, on the record here, make sure that my understanding is correct... ERISA in any form or fashion is out of the case?

Mr. Schmidt: Yes. We have amended it out of the case. Anderson Deposition at p. 112 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition excerpts attached to Affidavit of Michael A. Piazza).

[38] *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (recognized a cause of action when an employee is fired solely because he refused to commit a criminal act).

[39] Defendant's Brief in Support of Motion for Summary Judgment dated May 4, 1993 (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993).

[40] Memorandum Order pp. 5-8, dated June 4, 1993 (R. 705-708).

ment for EDS, concluding all issues as to all parties.[41] This appeal then ensued.

SUMMARY OF THE ARGUMENT

The district court had subject matter jurisdiction to enter summary judgment in favor of EDS and against Anderson on three separate grounds. One, under the well pleaded complaint rule, Anderson's Original Petition raised issues of federal law which created federal question jurisdiction. Anderson claimed that he was terminated because he refused to do certain acts that would have violated ERISA. For Anderson to succeed on his claim, the court would have had to determine whether an ERISA covered benefit plan was involved and whether the acts Anderson was requested to do would in fact have violated ERISA or the terms of an employee benefit plan covered by ERISA. The decision in *Ingersoll-Rand Co. v. McClendon* teaches that these ERISA related issues are critical to a wrongful discharge claim based on alleged violations of ERISA.

Two, the district court also had federal question jurisdiction under the complete preemption doctrine. In *Metropolitan Life Ins. Co. v. Taylor,* the Supreme Court extended the doctrine to any state law cause of action that falls within the scope of the civil enforcement provisions of ERISA, 29 U.S.C. § 1132(a). Anderson's claim falls within the scope of ERISA's civil enforcement scheme, which includes enforcement of ERISA's provisions concerning the administration of covered plans and the enforcement of the fiduciary duties created by ERISA. Anderson alleged facts indicating that he served as a plan manager, administrator, and fiduciary. Anderson claims that in his role managing and administering EDS' ERISA plans, he was requested to violate ERISA and that when he refused, his supervisor either committed the violation or forced someone else to commit it. Anderson's claims

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[41] Judgment dated June 4, 1993 (R. 709).

fall within the scope of section 1132. For example, as a participant, beneficiary, or fiduciary of an ERISA covered plan, Anderson could have brought suit under section 1132(a) to enjoin any violation of ERISA, an ERISA plan, or his rights under ERISA or an ERISA plan.

Three, the district court also had original subject matter jurisdiction at the time it entered summary judgment in favor of EDS. The Supreme Court decision in *Grubbs v. General Electric Credit Corp.* and this Circuit's decisions in *Baris v. Sulpicio Lines, Inc.* and *Kidd v. Southwest Airlines* provide that when a case is improvidently removed and tried on the merits either without objection by the plaintiff or after the plaintiff has waived his right to object, the test for determining jurisdiction is whether the district court would have had original jurisdiction over the case if the plaintiff had chosen to bring it in federal court. This determination is made based on the facts, pleadings, and record as they existed at the time of judgment. By failing to file his motion to remand in a timely manner, as required by 28 U.S.C. § 1447(c), Anderson waived his right to oppose the removal. At the time the district court entered summary judgment for EDS, it had original subject matter jurisdiction based on the diversity of the parties. Anderson admitted in his deposition taken less than two months before the judgment that he was living and working in Oklahoma City, Oklahoma, and that he had been working in Oklahoma City continually at the same job since before he filed suit. EDS was a Texas resident.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO ENTER SUMMARY JUDGMENT AGAINST ANDERSON.

A. The District Court Had Removal Jurisdiction Based on Anderson's Well Pleaded Petition.

1. Anderson's Petition Raised Federal Question Issues Under ERISA.

A defendant may remove to federal court any civil action over which the federal courts have original jurisdiction founded on a claim or right arising under federal law.[42] For purposes of removal, a civil action arises under federal law when "the vindication of a right under state law necessarily turns upon some construction of federal law"[43] or when the action requires the resolution of a substantial question of federal law.[44]

In determining whether a cause of action arises under federal law, courts apply the "well-pleaded complaint" rule. The rule provides that a cause of action arises under federal law only when, at the time of removal, the plaintiff's well-pleaded complaint raises issues of federal law or discloses a federal controversy.[45]

Anderson's Original Petition, the pleading upon which removal was based, raised issues of federal law — issues that would have to be resolved for him to succeed on his claim. Anderson has

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[42] 28 U.S.C. § 1441(a) and (b). *See, e.g., Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. 1542, 1546 (1987).

[43] *Kidd v. Southwest Airlines, Co.,* 891 F.2d 540, 542 (5th Cir. 1990).

[44] *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 103 S. Ct 2841, 2845-46, 2856 (1983).

[45] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. at 1546; *Gully v. First Nat'l Bank in Meridian,* 57 S. Ct. 96, 98 (1936).

admitted that he was an employee-at-will.[46] Under Texas law, an employee-at-will can be terminated at any time for any or no reason.[47] The Texas supreme court announced the only common law exception to the Texas employee-at-will doctrine in *Sabine Pilot*: an employee could not be lawfully terminated solely because he refused his employer's request to commit an illegal act.[48]

In his Original Petition, Anderson alleged that he was discharged "from his position of employment at EDS because of, and in retaliation for, [his] refusal to commit illegal activities at Crow's request ...."[49] Anderson alleged specifically that Crow retained a consultant to do certain work on behalf of EDS's retirement plan without obtaining the approval of the trustees of the plan, and then asked Anderson to approve the consultant's invoice for payment, again without trustee approval. According to Anderson "[s]uch action would have been a violation of the Federal Employee Retirement Income Security Act of 1974

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[46] *See* Plaintiff's Brief in Opposition to Motion for Summary Judgment of Defendant Electronic Data Systems Corp. p. 4, dated May 25, 1993 (hereinafter "Anderson Summary Judgment Brief at ") (R. Sealed, Docket Numbers 79-80, Filed May 25, 1993).

Anderson further admitted in response to EDS' summary judgment motion that for him to have a cause of action based on his discharge, he had to establish a *Sabine Pilot* exception to the employment-at-will doctrine. *Id.* at 4-5 (R. Sealed, Docket Numbers 79-80, Filed May 25, 1993).

[47] *See, e.g., Pease v. Pakhoed Corp.*, 980 F.2d 995, 1000 (5th Cir. 1993) ("In Texas, the employment-at-will doctrine is well settled and mandates that a worker may be terminated without cause and at the will of either party."); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723 (Tex. 1990) ("The long standing rule in Texas is that employment for an indefinite term may be terminated at will and without cause.").

[48] *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d at 735.

[49] Original Petition ¶ XVI (R. 101-102).

. . . ."[50] Anderson further alleged that Crow asked him to "write up" minutes of the meetings of the trustees of the retirement plan, meetings that Anderson had not attended. Anderson alleged that "[t]his also is in violation of ERISA."[51]

For Anderson to succeed under *Sabine Pilot*, not only did Anderson have to be able to show that he was terminated solely because he refused to commit the acts requested by Crow, but also that the acts requested were illegal.[52] This latter showing would have required the parties and the court to review, interpret, and apply ERISA law. Put another way, in order for Anderson to vindicate his rights, the district court would have had to (i) determine whether the plan or plans to which Anderson was referring were covered by ERISA, and, if so, (ii) construe ERISA and the relevant plan or plans to determine if approval of the invoices or preparation of the minutes would have violated either ERISA or the plans. The need for that inquiry raised a federal question.[53]

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[50] *Id.* ¶ VII (R. 96-97).

[51] *Id.* (R. 96-97).

[52] *Sabine Pilot Services, Inc. v. Hauck*, 687 S.W.2d at 735 ("it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act."). *See Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 (Tex. 1990) (employee must be put in the position of having to choose between continued employment and risking criminal liability).

[53] Anderson's pleadings also support the propriety of the removal and the district court's refusal to remand the case. In his Motion to Remand, Anderson admitted that the allegations that he was wrongfully terminated for refusing to violate ERISA comprised a portion of his claim. Motion to Remand at p. 2 (R. 300).

In his August 1991 answers to interrogatories, Anderson reinforced the fact that his claims raised issues under ERISA. He clarified his accusations that Crow asked him to violate ERISA, accused Crow of

2. The ERISA Issues Raised By Anderson Were Not Collateral, But Were Critical To His Claims.

Anderson argues that his wrongful discharge claim is based solely on Texas state law and that ERISA is purely collateral and incidental to his claim.[54] The Supreme Court rejected a similar argument in *Ingersoll-Rand Co. v. McClendon.*[55]

McClendon claimed that his employer discharged him to avoid having to make contributions to his pension fund.[56] He sued his employer, Ingersoll-Rand, in Texas state court for wrongful termination. The Texas supreme court ruled that McClendon could recover for wrongful discharge if he proved that the principal reason for his termination was his employer's desire to avoid contributing to, or paying benefits under, an employee benefit plan.[57] The United States Supreme Court found ERISA to be an integral part of McClendon's wrongful discharge action.

The Court held that "the existence of a pension plan is a critical factor in establishing liability under the State's wrongful

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violating ERISA, and identified people with knowledge of the accusations. *See supra.* note 20.

The well-pleaded complaint rule instructs a court not to be persuaded when making its determination by either the defenses the plaintiff may be anticipating in its complaint or the notice of removal filed by the defendant. *See Gully v. First Nat'l Bank in Meridian*, 57 S.Ct. 96, 98 (1936). The rule does not, however, prohibit a court from taking notice of any admissions by the plaintiff regarding the nature of the claims he asserted in his complaint.

[54] Anderson Appeal Brief at p. 10.

[55] 111 S. Ct. 478 (1990).

[56] McClendon claimed that his pension benefits were due to vest shortly. *Id.* at 481.

[57] *Id.* at 481.

discharge law."[58] It explained that the "Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan."[59] "Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment."[60]

As Anderson has done, McClendon argued that the pension plan was irrelevant to his cause of action; the only issue was whether Ingersoll-Rand's motive for terminating him was improper. The Court rejected McClendon's argument because it missed the point "that under the Texas court's analysis there simply is *no* cause of action if there is no plan."[61]

3. Willy v. Coastal Corp. Does Not Support A Contrary Result.

Anderson cited *Willy v. Coastal Corp.*[62] in support of his argument.[63] *Willy*, decided before the Supreme Court's decision in *Ingersoll-Rand*, is not controlling.

Willy alleged that he was wrongfully discharged because he refused to violate certain state and federal environmental laws and

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[58] *Id.* at 483. *See McLean v. Carlson Companies*, 777 F. Supp. 1480, 1483 (D. Minn. 1991) (McLean's claim that she was terminated because she reported ERISA violations to her employer referred to, and depended on the existence of, an ERISA plan).

[59] *Id.*

[60] *Id. See McLean v. Carlson Companies*, 777 F. Supp. at 1483 (to prove her claim, McLean had to describe the conduct she claimed violated ERISA and the ERISA provisions violated).

[61] *Id.* at 484 (emphasis in original).

[62] 855 F.2d 1160 (5th Cir. 1988).

[63] *See* Anderson Appeal Brief at p. 9.

because he insisted that his employer comply with the laws.[64] The court found that Willy's wrongful discharge claim did not arise under federal law because (i) the federal environmental laws did not provide Willy a private cause of action, (ii) Willy stated alternative theories of recovery under both state and federal environmental law, and (iii) the federal issues in Willy's wrongful discharge case — whether he had been asked to act in violation of the environmental laws — were collateral in nature and not substantial in relation to the claim as a whole.[65]

None of the three grounds relied upon in *Willy*, let alone all three, are present in this case. First, unlike Willy, Anderson did have a cause of action under ERISA if he had chosen to pursue it. Anderson alleged that Crow asked him to violate ERISA and when he refused, Crow either committed the violation himself or forced someone else to do it.[66] Section 502(a) of ERISA provides that a participant, beneficiary, or fiduciary may bring a civil action to enjoin any act or practice that violates the administrative provisions of ERISA or of an ERISA covered plan.[67] As defined by ERISA, Anderson is a participant, a beneficiary, and a fiduciary.[68]

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[64] *Willy v. Coastal Corp.*, 855 F.2d at 1162-63.

[65] *Id.* at 1169-71.

[66] Original Petition ¶ VIII (R. 97).

[67] 29 U.S.C. § 1132(a)(3).

[68] "The term 'participant' means any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . ., or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7).

"The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

"[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting

In addition, Anderson alleged that (i) Crow threatened him on three separate occasions after he refused to commit illegal acts and (ii) Crow and Weynand sought to discriminate against him and terminate him because of his refusal and because he accused Crow of wrongdoing.[69] Section 510 of ERISA prohibits any person from discharging, fining, suspending, expelling, disciplining, or discriminating against a participant or beneficiary for exercising any right he may have under subchapter one of ERISA.[70] Again, section 502 provides a cause of action for violation of section 510.[71]

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management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Anderson alleged that he was responsible for all domestic and long term investments for all of EDS' investment portfolios, including EDS' pension funds. Original Petition ¶ IV (R. 94-95).

[69] *Id.* (R. 94-95) Anderson later dropped the second allegation. *See* Plaintiff's Second Amended Complaint at ¶¶ 12-15 (R. 675-677).

[70] 29 U.S.C. § 1140. Subchapter one of ERISA includes provisions on disclosure, reporting, preparation of plan descriptions, filing and furnishing of information, participation standards, accrual and payment of benefits, funding standards, establishment of a plan, fiduciary duties and liability, and coercion and interference with protected rights. 29 U.S.C. §§ 1001-1145.

[71] 29 U.S.C. § 1132(a)(3). In addition, Anderson would have had an action under § 1132(a)(2) to seek relief under 29 U.S.C. § 1109. The latter section creates liability when a fiduciary breaches a duty owed to the plan. Those duties include, *inter alia*, (i) administering the plan as would a prudent man acting in the same capacity, (ii) acting solely in the interest of the participants and beneficiaries in defraying the reasonable expenses of administering the plan, and (iii) not knowingly allowing another fiduciary to breach his duties. 29 U.S.C. §§ 1104 and 1105. Anderson alleged facts making Crow a fiduciary as well. Original Petition ¶¶ VI, VII, and VIII (R. 95-97).

Second, Anderson's claims concerned violations of ERISA, not violations of the environmental laws as in *Willy*. The states have been "traditional partners" with the federal government in the field of environmental regulation.[72] ERISA, on the other hand, took from the states any shared responsibility for the regulation of employee benefit plans.[73] Congress preempted all state laws that related to employee benefit plans covered by ERISA.[74] Congress deliberately "establish[ed] pension plan regulation as exclusively a federal concern."[75] Due to ERISA's broad preemption provision, Anderson, unlike Willy, could not assert that the acts he was allegedly asked to do in violation of ERISA also violated state law.[76]

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[72] *Willy v. Coastal Corp.*, 855 F.2d at 1167, n. 10.

[73] ERISA's preemption provision "demonstrates that Congress intended to depart from its previous legislation that 'envisioned the exercise of state regulation power over pension funds,' . . . and meant to establish pension plan regulations as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895, 1906 (1981).

[74] U.S.C. § 1144(a). *See infra.* text accompanying notes 97-101.

[75] *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1552 (1987). *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1217 (5th Cir. 1992) ("The Supreme Court has consistently emphasized the expansiveness of [ERISA's preemption provision] and its purpose of establishing the regulation of pension plans as an exclusively federal concern."), *cert. denied*, 113 S. Ct. 68 (1992).

[76] The court in *Willy* recognized this distinction. It noted that "Congress had expressed an explicit intent for actions preempted by section 502(a) [of ERISA] to arise under federal law," but that the legislative history of the environmental statutes underlying Willy's claim did not evidence the same Congressional intent, *Willy v. Coastal Corp.*, 855 F.2d at 1166.

Also, unlike Willy, Anderson did not specifically allege in his Original Petition that he was asked to violate any state laws. Original Petition at VII (R. 96-97).

Third, as discussed above, the Court in *Ingersoll-Rand* rejected *Willy's* third ground for ruling: that the federal issues in a wrongful discharge case are collateral and not substantial.[77] Due to the differences between the environmental laws in *Willy* and ERISA, differences which the court in *Willy* noted, and the Supreme Court's rejection of *Willy's* view of the collateral nature of the federal issues, the decision in *Willy* is not controlling.[78]

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[77] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 483. *See supra.* text accompanying notes 58-61.

[78] Anderson also cited *Sperling v. Texas Health Enterprises, Inc.*, 791 F. Supp. 662 (S.D. Tex. 1992); and *Nowoc v. Rheem Mfg. Co.*, 772 F. Supp. 977 (S.D. Tex. 1991). Again, neither decision is controlling.

As the district court recognized in *Sperling*, that case is distinguishable from *Ingersoll-Rand.* It is also distinguishable from the facts of this case. Sperling sued for wrongful discharge alleging that he was terminated because he refused to participate in his employer's accident plan. *Sperling v. Texas Health Enterprises, Inc.*, 791 F. Supp. at 663. The court found that such an action was not preempted by ERISA and distinguished the case on three grounds. One, unlike McClendon (and Anderson), Sperling was not a plan participant or beneficiary. Two, Sperling did not allege a violation of ERISA or an employee benefit plan as McClendon (and Anderson) alleged. Three, Sperling would have had a cause of action even if there was no ERISA covered plan. The court found that the same could not be said for McClendon. Similarly, based on *Ingersoll-Rand*, the same can not be said for Anderson either. *Id.* at 664-65.

The court in *Nowoc* also distinguished its case from *Ingersoll-Rand.* It, too, is distinguishable from the facts in this case. Nowoc alleged that he was fired in violation of an alleged duty of good faith and fair dealing. Among the damages he sought were "fringe benefits." The court distinguished the case from *Ingersoll-Rand* because (i) Nowoc had not alleged a violation of ERISA in his pleadings and (ii) the loss of Nowoc's pension benefits was a mere consequence of his termination. Unlike in *Ingersoll-Rand* and this case, no ERISA violations were alleged to have been involved in the decision to terminate Nowoc. *Nowoc v. Rheem Mfr. Co.*, 772 F. Supp. at 979.

Under the well-pleaded complaint rule, Anderson's Original Petition stated claims arising under federal law. As *Ingersoll-Rand* instructs, the federal issues went to the heart of Anderson's claim. The district court had federal question subject matter jurisdiction.

B. The District Court Had Removal Jurisdiction Based On The Complete Preemption Doctrine.

1. The Complete Preemption Doctrine Applied to Anderson's Suit.

Even if Anderson's Original Petition did not state a claim arising under federal law, removal was still proper under the "complete preemption" doctrine. Federal preemption is ordinarily a defense and does not support removal under the "well-pleaded complaint" rule.[79] The Supreme Court, however, has recognized that Congress can so completely preempt an area of law that any state law cause of action within that area is treated as federal in character and is removable without regard to the well-pleaded complaint rule.[80]

The Supreme Court first applied the complete preemption doctrine to section 301 of the Labor Management Relations Act ("LMRA") in *Avco Corp. v. Machinists.*[81] The Court later explained that:

> the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the

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[79] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. 1542, 1546 (1987).

[80] *Id.*

[81] 88 S. Ct. 1235 (1968). *See, e.g., Richardson v. United Steelworkers of America,* 864 F.2d 1162, 1167 (5th Cir. 1989), *cert. denied,* 110 S. Ct. 2204 (1990).

fact that state law would provide a cause of action in the absence of § 301.[82]

The Supreme Court extended the complete preemption doctrine to ERISA in *Metropolitan Life Ins. Co. v. Taylor.*[83]

Taylor, a participant in a health insurance plan offered by his employer and insured by Metropolitan Life, sued both when the latter denied him benefits under the plan. He asserted state law claims for breach of contract, reimplementation of all benefits and insurance coverage, wrongful termination, and wrongful failure to promote.[84] The defendants removed. The district court upheld the removal, but the court of appeals reversed. It found that Taylor's complaint stated only state law causes of action subject to the federal defense of ERISA preemption which did not support removal.[85] The Supreme Court reversed the court of appeals.

The Court framed the issue before it as whether the *Avco* principle could be extended to recharacterize a state law complaint displaced by section 502(a) of ERISA as an action arising under federal law.[86] It began its analysis of the issue by finding that the policy choices underlying ERISA's enforcement

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[82] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. at 1546, *quoting, Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 103 S. Ct. 2841, 2853 (1983). *See also Arron v. National Union Fire Ins. Co. of Pittsburg,* 876 F.2d 1157, 1161 (5th Cir. 1989) (*Avco Corp.* "holds that federal law can so completely preempt a field of state law that the plaintiff's complaint must be recharacterized as stating a federal cause of action."), *cert. denied,* 110 S. Ct. 1121 (1990).

[83] 107 S. Ct. 1542, 1547-48 (1987).

[84] *Id.* at 1545.

[85] *Id.*

[86] *Id.* at 1547. Before reaching the ultimate issue the Court recognized that under its decision in *Pilot Life Ins. Co. v. Dedeaux,* 107 S. Ct. 1549 (1987), announced the same day, Taylor's state common law tort and contract claims were preempted by ERISA. *Id.* at 1546.

scheme would be undermined if plaintiffs were allowed to pursue state law remedies.

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.[87]

The Court next found that the language of ERISA's jurisdictional provision closely paralleled that of section 301 of the LMRA and noted that similar language in two labor laws should have a similar meaning.[88] The Court further found that this presumption of similarity was "fully confirmed by the legislative history of ERISA's civil enforcement provisions."[89]

Based on the policies underlying ERISA and its enforcement scheme, the similarities between the language of ERISA's jurisdictional provision and section 301 of the LMRA, and the legislative history of ERISA, the Court held that Congress "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court."[90] The Court found Taylor's claims within the scope of section 502(a), and properly removable.[91]

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[87] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. at 1547.

[88] *Id.*

[89] *Id.* For example, the Conference Report on ERISA stated that "[A]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. *Id.* at 1547, *quoting,* H.R.Conf.Rep.No. 93-1280, p. 327.

[90] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. at 1546-48.

[91] *Id.* The Court concluded that "this suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. It, therefore, 'arise[s] under the . . . laws . . . of the United States,' 28 U.S.C. § 1331, and is

Under the teaching of *Taylor*, Anderson's suit was properly removed to federal court. Anderson's claim of wrongful discharge based on his refusal to do certain administrative acts in violation of ERISA is within the scope of section 502(a) of ERISA.

Section 502(a) provides in part that any participant, beneficiary, or fiduciary may bring a civil action:

> "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[92]

Subchapter one, in which section 502(a) is located, includes all of the administrative and enforcement provisions regarding ERISA employee benefit plans: provisions regarding disclosure, reporting, preparation of plan descriptions, filing and furnishing of information, participation standards, accrual and payment of benefits, funding standards, establishment of a plan, fiduciary duties and liability, and coercion and interference with protected rights.[93]

Anderson's allegations that he was requested to take certain administrative actions in violation of ERISA, and in violation of his fiduciary duties under ERISA, fall within the scope of subchapter one and section 502(a).[94] As a result, under *Taylor*,

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removable to federal court by the defendants, 28 U.S.C. § 1441(b)." *Id.* at 1548.

[92] 502(a)(3); 29 U.S.C. 1132(a)(3).

[93] 29 U.S.C. §§ 1001-1145.

[94] *See supra.* text accompanying notes 66-71. Anderson's allegations that he was terminated for reporting Crow's wrongful conduct, including ERISA violations, also falls within section 502(a). Section 510 makes it unlawful to discharge or discriminate against any person because he has given information regarding an ERISA violation or as part of an ERISA investigation. 29 U.S.C. § 1140. *See McLean v. Carlson Companies,* 777 F. Supp. at 1484 ("Plaintiff clearly would have

Anderson's claim was properly characterized as federal in nature and removable to federal court.[95]

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recourse under § 510 had she been discharged in retaliation for commencing legal action against defendant to correct what she perceived to be violations of ERISA. In view of the express authorization to *sue* to remedy violations of ERISA, the court finds it logical to infer the plaintiff also possesses the right to inform plan administrators of suspected violations of ERISA"). *Cf. Rayner v. Smirl,* 873 F.2d 60, 63-64 (4th Cir. 1989) (held that whistleblower provision in Federal Railroad Safety Authorization Act, which provided an exclusive remedy preempting state claims for wrongful discharge and making removal appropriate, extended to intra-corporate complaints finding that the distinction between intra-corporate complaints and complaints to outside agencies to be artificial in light of the comprehensive nature of the Act).

In addition, as a fiduciary, Anderson owed certain duties and obligations to the plan. 29 U.S.C. §§ 1104, 1105. One of those duties involved not allowing a co-fiduciary to violate ERISA, the plan, or his duties. *Id.* at § 1105. As a fiduciary, Anderson had the right to enjoin others from violating ERISA, including other fiduciaries. *Id.* at § 1132(a)(2) and (3). It would be consistent with the purposes of ERISA and the enforcement scheme for Anderson also to have the right to enjoin Crow, another fiduciary, from forcing him to violate ERISA and his duties.

[95] Broad removal is consistent with Congress' desire (i) for uniformity of regulation, (ii) for exclusivity of federal regulation, and (iii) to have ERISA's preemption provision broadly construed. Allowing Anderson to proceed in state court with his claim, requiring a determination whether certain conduct would violate ERISA or an ERISA plan, is inconsistent with Congress' desires and the structure and purpose of ERISA. *See supra.* notes 96-100, 104-105, 107. *See also Pilot Life Ins. Co. v. Dedeaux,* 107 S. Ct. at 1555 (in expounding on a statute, a court should be guided by the provisions of the entire statute and by its object and policy). *NLRB v. Scrivener,* 92 S. Ct. 798, 802 (1972) (whether other provisions of a statute have been interpreted broadly or narrowly is pertinent precedent when construing another provision of the statute).

2. Anderson's Claim Was Preempted by ERISA.

Although Anderson did not discuss the "complete preemption" doctrine in his brief, he did assert that his claim is neither preempted by ERISA nor removable because ERISA does not provide a specific remedy for wrongful termination based on a refusal to violate ERISA.[96] Anderson is incorrect. His claim is preempted by ERISA and removable under ERISA regardless of whether ERISA provides him with an identical cause of action.

The *Ingersoll-Rand* decision teaches that Anderson's wrongful discharge claim is preempted by ERISA regardless of whether ERISA contains a cause of action identical to Anderson's state law claim. The Court noted that ERISA's preemption clause is "conspicuous for its breadth" and that its "deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern."[97]

ERISA's preemption provision is embodied in section 514(a) which provides that ERISA displaces any and all laws that relate to an employee benefit plan covered by ERISA.[98] The

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[96] Anderson Appeal Brief at pp. 13-14.

[97] *Ingersoll-Rand Co. v. McClendon,* 111 S. Ct. at 482, *quoting, FMC Corp. v. Holliday,* 111 S. Ct. 403, 407 (1990) and *Pilot Life Ins. Co. v. Dedeaux,* 107 S. Ct. 1549, 1552 (1987). *See, e.g., Christopher v. Mobil Oil Corp.,* 950 F.2d 1209, 1217 (5th Cir. 1992).

[98] 29 U.S.C. § 1144(a). *See, e.g., Mackey v. Lanier Collection Agency & Service,* 108 S. Ct. 2182, 2185 (1988) (ERISA's preemption provision displaces all state laws that fall within its sphere); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.,* 891 F.2d 548, 553 (5th Cir.) ("Because of the breadth of the preemption clause and the broad remedial purpose of ERISA, 'state laws found to be beyond the scope of [the preemption clause] are few.' "), *cert. denied,* 110 S. Ct. 3272 (1990).

ERISA lists the general areas of state concern exempt from the reach of its preemption provision — insurance, banking, securities, and general criminal laws. *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 107 S.

Court noted that Congress rejected more limited preemptive language which would have limited the provision's application to state laws relating to the specific subjects covered by ERISA. "[T]o underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the 'State law' that would be preempted. Such laws include 'all laws, decisions, rules, regulations, or other State action having the effect of law.' "[99]

The Court further noted that a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[100] This holds true, even if the law is not "specifically designed to affect" employee benefit plans, or "the effect is only indirect."[101]

Ct. at 1552; *Shaw v. Delta Air Lines,* 103 S. Ct. 2890, 2903 (1983). "There is no reason to believe that Congress intended implicitly to exempt a whole range of state laws when it showed itself perfectly capable of carving out specific exemptions." *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1334 (5th Cir.), *cert. denied,* 113 S.Ct. 812 (1992).

[99] *Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. at 482-83, *quoting,* 29 U.S.C. § 1144(c)(1). *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1552 (1987), *quoting,* Sen. Williams, one of the sponsors of ERISA, 120 Cong.Rec. 29933 (1974) (preemption "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."); *Corcoran v. United Healthcare, Inc.,* 965 F.2d at 1328 n.10 ("Statutory, decisional, and all other forms of state law are included within the scope of the preemption clause.").

[100] *Ingersoll-Rand Co. v. McClendon, 111 S.Ct. at 483, quoting, Shaw v. Delta Air Lines,* 103 S.Ct. 2890, 2900 1983). *See, e.g., Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321, 1328-29 (5th Cir.), *cert. denied,* 113 S.Ct. 812 (1992).

[101] *Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. at 483. *See, e.g., District of Columbia v. Greater Washington Board of Trade,* 113 S.Ct. 580, 583 (1992); *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. at 1553; *Corcoran v. United Healthcare, Inc.,* 965 F.2d at 1329 ("a law is not

Based on the foregoing principles, the Court found that McClendon's wrongful termination cause of action was a state law related to ERISA and therefore preempted by section 514(a).[102] The Court noted that it was not dealing with "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan."[103] Instead, the existence of a pension plan was a "critical factor in establishing liability under the State's wrongful discharge law."[104]

The Court believed that Congress' purposes for having a broad preemption provision supported its finding of preemption. By providing for broad preemption, the Court noted that Congress sought to ensure the creation of uniform standards thereby avoiding the administrative and financial cost of complying with varying state standards.

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise,

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saved from preemption merely because it does not target employee benefit plans. Indeed, much preemption litigation involves laws of general application which, when applied in particular settings, can be said to have a connection with or a reference to an ERISA plan."); *Christopher v. Mobil Oil Corp.*, 950 F.2d at 1218-19 ("preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general laws which in and of itself has no connection to employee benefit plans.").

[102] *Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. at 483.

[103] *Id.*

[104] *Id.* "Because the court's inquiry must be directed to the plan," the Court concluded that McClendon's "judicially created cause of action 'relates[s] to' an ERISA plan." *Id.*

> the inefficiencies created could work to the detriment of plan beneficiaries.[105]

The Court voiced concern that allowing state common law claims like McClendon's to proceed would subject plans and plan sponsors to differing state substantive laws an outcome that "is fundamentally at odds with the goal of uniformity that Congress sought to implement."[106]

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[105] *Id.* at 484. Reviewing the legislative history and the Court's prior decisions, the Supreme Court in *Fort Halifax* concluded that "Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations." *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217. Congress wanted to "ensur[e] that employers would not face 'conflicting or inconsistent State and local regulation of employee benefit plans' ". *Shaw v. Delta Air Lines*, 103 S. Ct. at 2904. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1552 (1987), *quoting*, Sen. Williams, 120 Cong. Rec. 29933 (1974) (preemption designed to eliminate "the threat of conflicting or inconsistent State and local regulation of employee benefit plans."); *Shaw v. Delta Air Lines*, 103 S. Ct. 2890, 2901 (1983), *quoting*, Rep. Dent, House sponsor of ERISA, 120 Cong. Rec. 29197 (1974) (the "crowning achievement" of ERISA was "the reservation to Federal authority the sole power to regulate the field of employee benefit plans.").

[106] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 484 ("Particularly disruptive is the potential for conflict in substantive law. It is forseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction."). *See, e.g., Corcoran v. United Healthcare, Inc.*, 965 F.2d at 1332 ("allowing the Corcorans' suit to go forward would contravene Congress' goals of 'ensur[ing] that plans and plan sponsors would be subject to a uniform body of benefit law' and 'minimiz[ing] the administrative and financial burdens of complying with conflicting directives among States or between States and the Federal Government."); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1219 (5th Cir. 1992) ("Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments . . . would undercut the goal of

The Court's preemption analysis was not dependent on whether McClendon had an identical or any cause of action awaiting him under ERISA.[107] The Court noted that when Congress chose to base section 502(a) on the exclusive remedy found at section 301 of the LMRA, it knew that section 301 displaced all state law claims "even when the state action purported to authorize a remedy unavailable under the federal provision."[108]

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uniform national regulations in the manner that section 514(a) seeks to prevent.").

[107] Only as an alternative ground for finding McClendon's claim preempted did the Court analyze whether ERISA provided a remedy. The Court found that "[e]ven if there were no express preemption in this case, the Texas cause of action would be preempted because it conflicts directly with an ERISA cause of action." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 484-85. Obviously, whether McClendon had a cause of action under ERISA played no role in the Court's primary preemption analysis.

[108] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 486.

The Supreme Court in *Pilot Life* summed up the balance sought in ERISA's civil enforcement scheme and its exclusive nature;

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'

The court in *Pilot Life* found the plaintiff's state law claims were preempted even though all of the remedies available

Like McClendon, Anderson's wrongful discharge claim referenced ERISA and was premised on the existence of an ERISA plan. Anderson's allegations required the court to determine whether an ERISA plan existed and whether Anderson was asked to do certain acts in violation of ERISA. If there was no ERISA plan, then there could have been no violation of ERISA. In addition, like McClendon, to allow Anderson to go forward on his claim would have the effect of subjecting an ERISA plan and plan sponsor to differing standards and rules for administering its ERISA plans.[109]

The only difference between McClendon's claim and Anderson's claim is the alleged motivation of their respective employers. McClendon alleged that his employer terminated him to keep his pension benefits from vesting. Anderson claims EDS terminated him because he refused to violate ERISA. The Court in *Ingersoll-Rand*, however, recognized this to be a distinction without a difference when determining preemption. The Court found that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits' . . . . Consequently, it is no answer to a preemption argument that a particular plaintiff is not seeking recovery of pension benefits."[110]

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under the state law were not available under ERISA *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. at 1556.

[109] *See McLean v. Carlson Companies*, 777 F. Supp. at 1483 (ERISA preempts "laws that provide remedies for misconduct growing out of the administration of ERISA plans.").

[110] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 486.

3. Anderson's Claim Was Removable Under ERISA.

The decision in *Taylor* defeats Anderson's contention that removal is inappropriate unless ERISA provides a private cause of action identical to his claim for wrongful termination. Anderson's argument misinterprets the test announced in *Taylor.*

Taylor does not provide that a state action can not be removed unless ERISA also provides the exact same federal cause of action. To the contrary, the test for removal announced in *Taylor* is whether the cause of action is "within the scope of the civil enforcement provisions of § 502(a) . . . ."[111] The Court in *Taylor* found that Taylor's claims for breach of contract, wrongful termination of disability benefits, wrongful termination, and refusal to promote were all properly removed to federal court,[112] even though ERISA does not provide identical causes of action.

This Circuit, too, has recognized that the existence of an identical remedy, or any remedy, under ERISA is not a prerequisite for either preemption or removal. For example, in *Corcoran v. United Healthcare, Inc.,*[113] the Corcorans sought authorization from United Healthcare, the utilization manager of the employee benefit plan that covered the Corcorans, for certain treatment for Mrs. Corcoran during her pregnancy. United Healthcare denied authorization. When their unborn child died, the Corcorans sued United Healthcare in state court claiming that United Healthcare negligently refused to authorize the necessary treatment. United

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[111] *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. at 1548. *See, e.g., Iron Workers Mid-South Pension Fund v. Terotechnology Corp.,* 891 F.2d 548, 551 (5th Cir. 1990) ("a state law cause of action that is within the scope of the civil enforcement provisions of ERISA § 502(a) was a well-pleaded federal claim.").

[112] *Id.* at 1545-46.

[113] 965 F.2d 1321 (5th Cir. 1992).

Healthcare removed and alleged that the Corcoran's claims were preempted by ERISA.[114]

Acknowledging that ERISA's civil enforcement scheme did not provide a private cause of action for medical malpractice and that a finding of preemption would leave a gap in ERISA's enforcement scheme, this Circuit nonetheless concluded that the Corcoran's claims were preempted by ERISA. The court explained that given the breadth of the preemption clause and the comprehensiveness of the statute, the lack of an ERISA remedy did not affect the preemption analysis.[115] The court also did not remand the case.[116]

Similarly, in *Hansen v. Continental Ins. Co.*,[117] when his wife died, Hansen sought to collect death benefits under an employee benefits plan. When a disagreement arose over the amount due Hansen under the plan, Hansen sued Continental, which had issued the coverage, in state court alleging various state common law causes of action. Continental removed and alleged that Hansen's claims were preempted by ERISA.[118]

Hansen argued that if his state law claims were preempted by ERISA, he would not have an adequate remedy for Continental's fraud and misrepresentation. The court ruled that even if ERISA did not provide an adequate remedy, Hansen's claims were preempted. "This Court has held that ERISA's preemption provision bars state law causes of action even though such

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[114] *Id.* at 1322-24.

[115] *Id.* at 1333-34.

[116] Although the Corcorans did not challenge the removal, the courts had a duty sua sponte to remand the case at any time either one determined that it lacked subject matter jurisdiction. *See, e.g., Griffith v. Johnston,* 899 F.2d 1427, 1429 (5th Cir. 1990).

[117] 940 F.2d 971 (5th Cir. 1991).

[118] *Id.* at 973-74.

preemption may leave a victim of fraud or misrepresentation without a remedy."[119] The court also found that the benefits plan underlying Hansen's claims was covered by ERISA and ruled that removal was proper.[120]

Anderson's claims of administrative violations of ERISA were within the scope of ERISA's civil enforcement scheme. The complete preemption doctrine, as applied to ERISA, gave the district court removal jurisdiction over Anderson's claims.

C. The District Court Had Original Jurisdiction at the Time of Judgment.

Even if the district court did not have federal question removal jurisdiction under either the "well-pleaded complaint" rule or the "complete preemption" doctrine, the district court did have original subject matter jurisdiction at the time it entered summary judgment for EDS. Under the Supreme Court's decision in *Grubbs v. General Electric Credit Corp.*[121] and this Circuit's decisions in *Baris v. Sulpicio Lines, Inc.*,[122] and *Kidd v. Southwest Airlines*,[123] the district court had subject matter jurisdiction to enter summary judgment against Anderson.

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[119] *Id.* at 979. "ERISA preemption may occur even though ERISA itself could not offer an aggrieved employee a remedy for alleged misrepresentation." *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 248 (5th Cir. 1990). "Plaintiffs and employees similarly situated receive the many protections of ERISA in exchange for certain rights to sue under previous federal and state law. *Id.* at 249, *quoting, Williams v. Caterpillar, Inc.*, 720 F. Supp. 148, 152 (N.D. Cal. 1989).

[120] *Hansen v. Continental Ins. Co.*, 940 F.2d at 973.

[121] 92 S. Ct. 1344 (1972).

[122] 932 F.2d 1540 (5th Cir.), *cert. denied*, 112 S. Ct. 430 (1991).

[123] 891 F.2d 540 (1990).

In *Grubbs*, General Electric Credit Corp ("GECC") sued Grubbs in Texas state court on a promissory note. Grubbs counterclaimed against GECC and added General Electric Co. ("GE") and the United States as third party defendants. The United States removed the case. The case proceeded to trial without objection.[124] On appeal, the court of appeals raised the question of jurisdiction. It concluded that Grubbs' basis for joining the United States was spurious, and therefore, the United States did not have a basis for removal.[125] The Supreme Court reversed.

The Supreme Court ruled that an alternative standard governed the determination of subject matter jurisdiction in situations where (i) the case is improperly removed to federal court; (ii) the federal court nonetheless tries the case on the merits and enters judgment; and (iii) no objection is raised regarding the removal until after judgment is entered. The question on appeal becomes whether the district court would have had original jurisdiction over the suit if it had been brought in federal court.[126] The determination is based on the record and pleadings as they existed at the time of the judgment.[127]

The Supreme Court determined that the district court would have had diversity jurisdiction if the action had been brought in federal court initially. Record excerpts from discovery proceedings established that Grubbs was a Texas citizen, and GECC and

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[124] *Grubbs v. General Electric Credit Corp.*, 92 S. Ct. at 1346-47.

[125] *Id.* at 1347. Grubbs joined the United States pursuant to 28 U.S.C. § 2410. The court of appeals determined that the only conceivable basis for jurisdiction was pursuant to 28 U.S.C. § 1444, which allows the United States to remove an action brought pursuant to § 2410.

[126] *Grubbs v. General Electric Credit Corp.*, 92 S. Ct. at 1347.

[127] *Id.* at 1348; *Kidd v. Southwest Airlines Co.*, 891 F.2d at 546. *See also Kliebert v. Upjohn Co.*, 915 F.2d 142, 145 (5th Cir. 1990) ("test jurisdiction on the facts as they existed when judgment was entered.")

GE were citizens of New York.[128] In reaching its conclusion, the Court distinguished *Grubbs* from the facts in *American Fire & Casualty Co. v. Finn.*[129] In *Finn*, the Court refused to find subject matter jurisdiction after judgment was entered because "complete diversity did not obtain even as of the date of judgment" and since there was no other basis for federal jurisdiction.[130]

Based on Anderson's allegations, the history of this case, and the record, this case satisfies the *Grubb* factors and *Finn*. One, assuming for the sake of argument that Anderson is correct that EDS improvidently removed his case, the first factor of *Grubbs* is satisfied. Two, it is undisputed that the district court entered summary judgment against Anderson. The second factor is satisfied by a summary judgment dismissal.[131]

The third factor requires that the case proceed through trial without objection as to the court's jurisdiction. A motion for remand typically constitutes an objection.[132] This Circuit has held, however, that the untimely filing of a motion to remand waives the opportunity to object to the removal.[133]

In *Baris*, the plaintiffs filed suit in Texas state court under the laws of the United States, including the general maritime laws and pursuant to the "saving to suitors" clause of 28 U.S.C.

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[128] *Grubbs v. General Electric Credit Corp.*, 92 S. Ct. at 1348.

[129] 71 S. Ct. 534 (1951).

[130] *Grubbs v. General Electric Credit Corp.*, 92 S. Ct. at 1348.

[131] *Kidd v. Southwest Airlines,* 891 F.2d at 546.

[132] *Id.* at 546-47.

[133] *Baris v. Sulpicio Lines, Inc.*, 932 F.2d at 1543 ("Even if this matter was improperly removed, the plaintiffs waived the opportunity to challenge the removal. That is because plaintiffs' motion to remand was untimely under 28 U.S.C. § 1447(c). *See also Kidd v. Southwest Airlines Co.*, 891 F.2d at 547 (waive objection by voluntarily taking action that gave district court original subject matter jurisdiction).

¶ 1333(1). On February 21, 1990, the defendants timely removed the action to federal court. The defendants then moved to dismiss. The court granted the motion on April 10, after the plaintiffs failed to respond. On April 16, 1990, the plaintiffs moved for a new trial, reconsideration, and to remand the action to state court.[134]

The court of appeals began by noting that the "saving to suitors" clause permits "admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well" and that such a suit can not be removed absent diversity jurisdiction.[135] The court then found that diversity jurisdiction did not exist in the case before it.[136] The court determined, however, that it did not need to decide whether the case had been properly removed because the plaintiffs waived their right to seek remand by failing to move for remand within the 30 day period provided by 28 U.S.C. § 1447(c).[137] The court concluded that once the 30 day period passed, "the district court properly retained jurisdiction, assuming that this is an action that originally could have been brought in federal court . . . ."[138]

Anderson waived his right to seek remand by failing to file a timely motion to remand. The Defendants removed the case on July 25, 1991. Anderson did not move to remand the case until December 5, 1991, well past the 30 day period established by 28 U.S.C. § 1447(c). "[O]nce the plaintiff has waived the right to contest removal, '[t]he jurisdictional issue on appeal becomes

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[134] *Baris v. Sulpicio Lines, Inc.*, 932 F.2d at 1542.

[135] *Id.* at 1542-43.

[136] *Id.* at 1543.

[137] *Id.*

[138] *Id.*

whether the federal district court would have had jurisdiction over the case had it originally been filed in federal court.' "[139]

The district court below would have had original jurisdiction of this case if Anderson had filed it with the court at the time it entered summary judgment on June 4, 1993. Diversity jurisdiction existed between EDS and Anderson at the time.[140] In fact, complete diversity existed between the parties at the time the case was filed.

All Defendants were citizens of Texas.[141] Anderson alleged in his Original Petition that he too was a Texas resident.[142] That allegation was incorrect. EDS took Anderson's deposition on April 26, 1993.[143] During the deposition, Anderson admitted that he was living and working in Oklahoma City, Oklahoma.[144] Anderson further testified that he took his current job in Oklahoma City, approximately nine months after he was terminated by EDS and that he had held that job continually through

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[139] *Baris v. Sulpicio Lines, Inc.*, 932 F.2d at 1546, *quoting, Kidd v. Southwest Airlines Co.*, 891 F.2d at 546. *See also Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1063 (5th Cir. 1992) (same).

[140] Prior to the summary judgment briefing and ruling, Anderson had voluntarily dismissed all Defendants but EDS. *See* Motion for Leave to File Plaintiff's Second Amended Complaint at p. 1 (R. 646).

[141] Original Petition ¶ I (R. 92093).

[142] *Id.* (R. 92-93).

[143] Portions of the transcript of the Anderson deposition are part of the record. As *Grubbs* teaches, this Court may rely on the record in determining whether the district court would have had original jurisdiction at the time it entered judgment. *Grubbs v. General Electric Credit Corp.*, 92 S. Ct. at 1348.

[144] *Id.* at pp. 7-8 (he lives at 305 Pheseant Run, Edmond Oklahoma) (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition excerpts attached to Affidavit of Michael A. Piazza).

the time of his deposition.[145] Anderson was terminated on August 23, 1989. According to his testimony, he took the job in Oklahoma City in approximately May or June 1990. He did not file suit until June 1991.

Given the diversity between the parties, if Anderson had chosen to bring the case in federal district court, the court would have had original jurisdiction. Under the decision in *Baris*, the district court, therefore, properly retained jurisdiction even if the case was improvidently removed, and had jurisdiction to enter summary judgment in favor of EDS.

CONCLUSION

At the time it entered summary judgment on behalf of EDS, the district court had (i) federal question removal jurisdiction under the "well-pleaded complaint" rule, (ii) federal question removal jurisdiction under the "complete preemption" doctrine and (iii) original subject matter jurisdiction based on diversity of citizenship among the parties. Any one of those three grounds is sufficient to provide the district court with jurisdiction to rule on EDS' motion for summary judgment.

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[145] Anderson Deposition at pp. 6 (he has been a salesman in Oklahoma City for the past two and three quarter years); 28 (he has held the same sales job since leaving EDS) (R. Sealed, Docket Numbers 71-75, Filed May 4, 1993, Anderson Deposition excerpts attached to Affidavit of Michael A. Piazza).

EDS requests this Court to deny Anderson all the relief he requests, including without limitation, vacating the judgments entered by the district court and directing that the case be remanded to Texas state court. EDS further requests the Court to dismiss the appeal and allow the summary judgments entered in favor of EDS and Crow to stand. The Court does not have to reach the merits of either summary judgment since Anderson did not raise any challenge to them in his Appellate Brief.

Respectfully submitted,

By: /s/ JEFFREY A. CARTER
Phillip N. Smith, Jr.
Texas State Bar No. 18752000
Jeffrey A. Carter
Texas State Bar No. 03919400
Michael A. Piazza
Texas State Bar No. 15966830

McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (facsimile)

Attorneys for Appellees,
ELECTRONIC DATA
SYSTEMS CORPORATION,
ANTHONY E. WEYNAND,
RICHARD P. SHLAKMAN, and
DARRELL JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 1993, a true and correct copy of the foregoing Brief of Appellees was forwarded by certified mail, return receipt requested to:

Cheryl P. Hunter
Jon W. Laasch
Hammons & Hunter
50 Penn Place, Suite 1300
Oklahoma City, Oklahoma 73118

John R. Woodward
Patrick Shaw
Woodward & Shaw
6688 North Central Expressway
Suite 1190
Dallas, Texas 75206

/s/ MICHAEL A. PIAZZA
Michael A. Piazza